4-202

Submitted

Jan 8/77

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~874~~. 5-61

THE BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON, PLAINTIFF IN ERROR,

VS.

DERRICK A. JANUARY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 20, 1875.

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Affirmed

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SUPREME COURT OF THE UNITED STATES.

No. 874.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON, PLAINTIFF IN ERROR,

VS.

DERRICK A. JANUARY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the circuit court of the United States for the district of Kansas.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE County of Johnson, of the State of Kansas.

Be it remembered, that on the 8th day of August, 1873, the said plaintiff, by Grant and Smith, his attorneys, filed in the clerk's office of said court his declaration, precipe, and security for costs in said entitled cause, which said declaration, precipe, and security for costs, with the endorsements thereon, are in the words and figures following, to wit:

Declaration.

In the United States circuit court for the district of Kansas, October term, A. D. 1873.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE County of Johnson, of the State of Kansas.
} Declaration.

The Board of Commissioners of the county of Johnson, of the State of Kansas, was summoned to answer Derrick A. January in a plea of debt.

And thereupon the said Derrick A. January, who avers that he is a
citizen of the State of Missouri, complains of the said Board of
2 Commissioners of the county of Johnson, State of Kansas,
"which he avers to be a municipal corporation, created by, existing under the laws, and a citizen of the State of Kansas, for that, heretofore, to wit, on the first day of July, A. D. 1869, the said defendant, The County of Johnson, by its certain writings obligatory, Nos. 6, 7, 8, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, sealed with its corporate seal and signed by B. F. Hollenbach, its chairman of the said board, and attested by F. E. Henderson, its clerk, and registered by J. H. Blake, its treasurer, bearing the said date, and here shown to the court, acknowledged itself indebted and bound to pay to the St. Louis, Lawrence and Denver Railroad Company, or bearer, the sum of one thousand ($1,000) dollars, by each of said bonds, on the first day of July, A. D. 1899, at the office of the treasurer of said county, and interest thereon at the rate of seven per cent. (7%) per annum, payable semi-annually, on the first days of January and July in each year, at the same place, and for said interest, coupons or interest-warrants were annexed to each of said bonds; and the plaintiff avers that he is the
bearer & holder of said bonds and coupons, and that there is due
3 and unpaid thereon the instalments of interest due on the first
day of January, A. D. 1873, of bonds Nos. 6, 7, 8, 21, 23, 36, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, making twenty.

one hundred and seventy ($2,170) dollars; and also the instalments of, due on the first day of July, A. D. 1873, off bonds Nos. 6, 7, 8, 21, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, making twenty-seven hundred and thirty dollars, ($2,730,) being in all one hundred and forty (140) coupons of thirty-five ($35) dollars each, making forty-nine hundred ($4,900) dollars. A copy of one of said bonds and of said coupons is hereunto attached and made a part hereof, the others being the same, except as to numbers of bond & coupon.

And the plaintiff avers that said bonds were executed and delivered to the said railroad company in payment of a subscription by said county to the stock of said railroad company.

And said bonds recite that they were executed and issued by virtue
of, and in accordance with, an act of the legislature of the State
4 of Kansas, entitled "An act to authorize counties and cities to
issue bonds to railroad companies," approved February 25th,
1868, and in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the said county of Johnson, at a regular election held on the sixth (6th) day of April, A. D. 1869, and the county has received, directly or indirectly, the stock for which said bonds were issued, and has paid one instalment of interest thereon, whereby the said defendant has become liable to pay, and an action has accrued to the plaintiff to have and recover of the said defendant the sum of forty-nine hundred ($4,900) dollars, debt, and forty-nine hundred ($4,900) dollars damages. Wherefore he sues.

GRANT & SMITH,
Atty. for Plff.

STATE OF IOWA,
County of Scott:

I, James Grant, being duly sworn, do state on oath that I am one of plaintiff's attys.; that this suit is for the recovery of money alone, and is upon written instruments which are in my possession and under my control; that I know the contents of the foregoing declaration, and all the facts therein stated are true, as I verily believe.

JAMES GRANT.

5 Subscribed and sworn to by James Grant, before me and in
my presence, this 26th day of July, A. D. 1873.

[SEAL.] W. M. KAEISER,
Notary Public, Scott County, Iowa.

Copy of bond and coupons referred to.

BOND.

No. 40.] UNITED STATES OF AMERICA. [$1,000.

Bond of Johnson County, State of Kansas.

Know all men by these presents that the county of Johnson, State of Kansas, acknowledges itself to owe and promises to pay to the St. Louis, Lawrence and Denver Railroad Company, or bearer, one thousand dollars, lawful money of the United States of America, on the first day of July, in the year of our Lord one thousand eight hundred and ninety-nine, at the office of the county treasurer of the county of Johnson, Kansas, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of January and July each year, on the surrender of the annexed coupons as they severally become due.

This bond is executed and issued by virtue of and in accord-
6 ance with the act of the legislature of the State of Kansas, entitled "An act to authorize counties and cities to issue bonds to railroad companies," approved February 25th, 1868, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county of Johnson, at a regular election held on the sixth (6th) day of April, 1869.

In testimony whereof the board of county commissioners of the said county of Johnson caused these presents to be signed by the chairman of the said board and by the clerk of the county, and to be sealed with the seal of said county, and to be registered by the treasurer of said county, dated Olathe, July 1st, 1869.

B. F. HOLLENBACH,
Chairman.
F. E. HENDERSON, *Clerk.*

C. H. BLAKE,
Treasurer.

(Indorsed:) I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature entitled "An act to authorize counties, incorporated cities, and municipal town-
ships to issue bonds for the purpose of building bridges, aiding
7 in the construction of railroads or other works of internal improve-
ments, and providing for the registration of such bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872.

Witness my hand and official seal this 21st day of March, 1872.

[SEAL.]
A. THORMAN,
Auditor of State.

Copy of coupon of bond No. 6, *due January 1st*, 1873.

$35.] STATE OF KANSAS. [$35.

The county of Johnson will pay to the bearer on the first day of January, A. D. 1873, thirty-five dollars interest due on their bond No. 6.

B. F. HOLLENBACH,
Chairman.
F. E. HENDERSON,
County Clerk.

Copy of coupon on bond No. 6, *due July 1st*, 1873.

$35.] STATE OF KANSAS. [$35.

The county of Johnson will pay to the bearer on the first day of July, A. D. 1873, thirty-five dollars interest due on their bond No. 6.

B. F. HOLLENBACH,
Chairman.
F. E. HENDERSON,
County Clerk.

Precipe.

In the United States circuit court for the district of Kansas.

8 DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE County of Johnson, in the State of Kansas.

The clerk will issue a summons in this cause in an action of debt, forty-nine hundred ($4,900) dollars, damages forty-nine hundred ($4,900) dollars, returnable at the next October term, at Leavenworth.

GRANT & SMITH,
Plf. Attys.

Security for costs.

I enter myself as surety for costs in this cause, and obligate myself to pay all costs to the opposite party, the defendants, and the officers of this court.

W. M. GRANT.

(Endorsed:) No. 735. In the United States circuit court for the district of Kansas. Derrick A. January vs. The Board of Commissioners of the County of Johnson, State of Kansas. October term, 1873. Declaration. A. S. Thomas, clerk. Grant & Smith, plff.'s attys.

And on this day, to wit, August 11th, 1873, the clerk of said court issued a summons in said entitled cause, which summons, with the marshal's return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, district of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

9 You are hereby commanded to notify the Board of Commissioners of the County of Johnson, of the State of Kansas, that it has been sued by Derrick A. January in the circuit court of the United States for the district of Kansas, and that unless it answers by the 10th day of September, A. D. 1873, the petition of the said Derrick A. January against it, filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this writ on the 21st day of August, A. D. 1873.

Witness the Hon. Nathan Clifford, presiding justice of the Supreme Court of the United States of America, at Topeka, in said district, this 11th day of August, A. D. 1873.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) Suit brought for the recovery of money. Amount claimed, debt $4,900, damages $4,900. Grant & Smith, attorneys for plaintiff. No. 735. Circuit court of the United States, district of Kansas. Derrick A. January vs. The Board of Commissioners of the County of Johnson, State of Kansas. Summons issued August 11th, 1873. Returnable August 21st, 1873. Grant & Smith, attorneys for plaintiff.

U. S. marshal's return.

DISTRICT OF KANSAS, *ss:*

Received the within writ of summons Aug. 11th, 1873, and served the same on the within-named defendant The Board of County Commis-
sioners of the County of Johnson, State of Kansas, at Johnson
10 County, State and dist. of Kas., by delivering personally to John
T. Taylor, clerk of said board, on the 15th day of Aug., 1873,
and by delivering personally to Harvy W. McClintock, chairman of said board, a true and certified copy of the within writ, with all endorsements thereon.

W. S. TOUGH,
U. S. Marshal for Dist. of Kans.,
By S. S. ELLIS,
Special Deputy.

Marsh. fees: For service of writ, 4.00; travel one way only, 125 miles, at 6c., 7.50—$11.50.

(Endorsed:) Filed Aug. 19, A. D. 1873. A. S. Thomas, clerk.

And on this day, to wit, Aug. 22d, 1873, the said plaintiff filed in the clerk's office of said court his amendment to declaration in said entitled cause, which amendment to declaration, with the endorsements thereon, is in the words and figures following, to wit:

Amendment to declaration.

In the circuit court of the United States for the district of Kansas.
November term, 1873.

DERRICK A. JANUARY *vs.* THE BOARD OF COMMISSIONERS OF JOHNSON County, Kansas.	Amendment to declaration.

1st. Now comes the plaintiff and amends his declaration, and for further cause of action says that on the 1st day of July, 1869, the said
county of Johnson, by its writing obligatory No. 26, like in its
11 obligations and terms to the bonds already set out, signed by
B. F. Hollenbach, chairman of said board, and sealed with its
corporate seal, and attested by F. E. Henderson, its clerk, and registered by J. H. Blake, its treasurer, bearing the said date, and here shown to the court, acknowledged itself indebted and bound to pay to the St. Louis, Lawrence and Denver Railroad Company or bearer the sum of one thousand ($1,000) dollars, by said bond, on the first day of July, A. D. 1899, at the office of the treasurer of said county, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July of each year, at the same place, and for said interest, coupons or interest-warrants were annexed to said bond, and the plaintiff avers that he is the bearer and holder of said bonds and coupons, and that there is due and unpaid thereon the instalment of interest due on the first day of July, A. D. 1873, off bond No. 26, for thirty-five ($35) dollars.

2d. And also the instalments of interest due on the first day of Jan-

uary, 1873, off bonds No. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, seventeen (17) coupons, for $35 each, making $595.00, in all six hundred and thirty ($630) dollars. Copies like said bonds
12 & coupons are already annexed to the petition, which are the same except as to No. of bonds, which are as follows: No. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, for January, & No. 26, for July, 1873, whereby the defendant has become liable to pay, and an action has accrued to the plaintiff to have and recover of the defendant the said sums.

GRANT & SMITH,
Attys. for Plaintiff.

STATE OF IOWA,
Scott County, *ss :*

I, James Grant, being duly sworn, do state on oath that I am one of plaintiff's attorneys; that this suit is for the recovery of money alone, and is upon written instruments, which are in my possession and under my control; that I know the contents of the foregoing declaration, and all the facts therein stated are true, as I verily believe.

JAMES GRANT.

Subscribed and sworn to by James Grant, before me and in my presence, this 19th day of August, A. D. 1873.

[SEAL.] W. M. KAEISER,
Notary Public, Scott County, Iowa.

(Indorsed:) U. S. C. ct., dist. of Kans. 735. Derrick A. January vs The Board of Commissioners of Johnson County. Amendment. Filed August 22d, 1873. A. S. Thomas, clerk. Grant & Smith, attys. for plaintiff.

13 And on this day, to wit, October 15th, 1873, came the parties, by their attorneys, and filed in the clerk's office of said court their stipulation in said entitled cause, which stipulation, with the endorsements thereon, are in the words and figures following, to wit:

Stipulation.

In the circuit court of the United States, district of Kansas.

DERRICK A. JANUARY, PLAINTIFF,
vs.
BOARD OF COUNTY COMMISSIONERS OF THE County of Johnson, defendant.

The plaintiff in the above-entitled cause hereby stipulates and consents that the defendant may have until the 15th day of October, 1873, to file an answer herein.

GRANT & SMITH, *for Pf.*

(Endorsed:) No. 735. January vs. Johnson Co. Coms. Stipulation for time to file answer to 15th October. Filed October 15, 1873. A. S. Thomas, clerk.

And on this day, to wit, October 15th, 1873, the said defendant filed in the clerk's office of said court its answer in said entitled cause, which answer, with the endorsements thereon, are in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the district of Kansas.

14 DERRICK A. JANUARY, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF
the County of Johnson, defendant.

I. The defendant, for answer to the petition of plaintiff, and each and every count thereof, and the amendments thereto, denies each and every allegation in the said petition and amendments thereto contained.

II. And for a second and further answer to the said petition, and each and every count thereof, and the amendments thereto, defendant says:

That on or about the 25th day of January, 1869, the board of county commissioners of Johnson County, at a meeting of the said board, made and caused to be entered of record on the record of the proceedings of said board, an order providing and directing that an election of the qualified voters of said county should be held on the sixth day of April, 1869, to decide whether said board should subscribe $100,000 to the capital stock of the St. Louis, Lawrence and Denver Railroad Company, and the further sum of $100,000 to the Kansas City and Santa Fé Railroad Company; that the ballots cast at said election should be
15 written or printed with the words "For subscription & bonds to railroads," and "Against subscription and bonds to railroads," and providing for holding said election on said day, and for the return and canvass of the votes cast thereat.

That an election was held pursuant to said order in said county, and that a majority of the votes cast at each election were "For subscription and bonds to railroads," and that said votes were canvassed, and the result of said election, as aforesaid, was ascertained and declared by said board.

That no other order, resolution, or other action of said board was ever had authorizing any election in said county to determine whether the said board should subscribe to the capital stock of said St. Louis, Lawrence and Denver Railroad Company, or issue bonds to or in favor of said company, and that no other action of said board was ever had or taken declaring the result of any such election, or determining that any such election had resulted in favor of such subscription or the issue of such bonds.

That at the time of the making of said order, and at the time of said election, the Kansas City and Santa Fé Railroad Company was a
16 railroad corporation other and different from the St. Louis, Lawrence and Denver Railroad Company, and that the line of railroad proposed to be built by said Santa Fé Railroad Company runs through a different portion of said county of Johnson from the line proposed to be built by the St. Louis, Lawrence and Denver Railroad Company.

That by the order of the board of county commissioners aforesaid the proposition for said county to take and subscribe stock and issue bonds to the St. Louis, Lawrence and Denver Railroad Company was coupled with a similar proposition to take stock and issue bonds to the Kansas City and Santa Fé Railroad Company, and the same submitted to the electors of said county to be voted for or against on one ballot, and in one vote, and the success of each proposition was dependent upon that of the other for the purpose and with the intent of prevent-ing, and did prevent, a full or fair vote and expression of the will of the voters of said county on the proposition to subscribe stock and issue bonds to said St. Louis, Lawrence and Denver Railroad Company, and for the purpose of securing, and did secure, the success of said proposition by obtaining therefor the votes of the friends of and persons locally interested in the other of said propositions.

17 That said order, and said election thereunder, by reason of the premises aforesaid, were not authorized by any law of the State of Kansas, and were wholly unauthorized and void, and that said election, by reason thereof, confer'ed no power or authority upon the board of county commissioners of said county, or upon said county, to subscribe stock or issue bonds to the said St. Louis, Lawrence & Denver Railroad Company for said county.

That, under color of said election and by no other authority, the persons constituting the board of county commissioners of said county did, on or about the day of , A. D. 18 , issue and did, on or about the day of , A. D. 18 , *did* deliver to the said St. Louis, Lawrence, and Denver Railroad Company certain instruments purporting to be the bonds of Johnson County, Kansas, in favor of the St. Louis, Lawrence and Denver Railroad Company, and to be due in thirty years after date, and to bear interest at the rate of seven per cent. per annum, payable semi-annually, with instruments purporting to be coupons thereto attached for said interest, without any authority in said persons as such commissioners or otherwise to issue or deliver said
18 pretended bonds and coupons or any or either of them.

That some of said pretended bonds or coupons appear on their face or from anything written or printed on them to have been issued under or by virtue of any law or statute of the State of Kansas, authorizing their issue or under or by virtue of any election held by authority of such law or statute.

That the pretended bonds described in the plaintiff's petition are part of the pretended bonds issued and delivered as hereinbefore set forth, and not other or different, and that the coupons declared on by plaintiff herein are part of the pretended coupons attached to the pretended bonds issued as aforesaid and none others.

That plaintiff received the pretended bonds and coupons aforesaid and each and all of them with full notice of the times of said order of January 25th, 1869, and of the several matters and things set forth in this defence and answer and had actual notice and knowledge thereof.

That plaintiff is not the holder of said bonds for value, but received said bonds without paying or giving therefor any consideration whatever.

Wherefore defendant prays judgment.

III. For a third defence to said petition and each and every
19 count thereof and the several amendments thereof defendant says:

That, on or about the 25th day of January, 1869, the board of county commissioners of said county of Johnson made and caused to be entered of record on the record of their proceedings a certain order for an election for the purpose of submitting to the qualified electors of said county the propositions stated and set forth in the second defence of this answer, as therein stated; that, by the terms of said order and the proposition submitted to vote of the qualified electors aforesaid, it was made an express condition of the authority thereby proposed to be conferred upon the board of county commissioners of said county to issue bonds to the St. Louis, Lawrence & Denver Railroad Company, "that no part of said bonds should be issued to the St. Louis, Law-

rence and Denver Railroad Company, until said railroad should be fully
graded, bridged, tied, ironed, and ready to be operated from Lawrence
via De Soto to Olathe, nor should any part of said bonds ever be issued
to said railroad company unless said portion of said railroad should be
so graded, bridged, tied, ironed and ready to be operated from Law-
rence to Olathe by the first day of January, 1871, nor should
20 more than fifty thousand dollars of said bonds be issued to said
railroad company until the railroad shall be fully graded, bridged,
tied, ironed, and ready to be operated from Olathe to the east line of
Johnson County in the direction of Pleasant Hill, Missouri; nor shall
the second fifty thousand dollars of said bonds be issued to said railroad
company, unless said portion of said railroad between Olathe & the line
of Johnson County shall be so graded, bridged, tied, ironed, and ready
to be operated by the first day of April, 1871."

That, on the 6th day of April, 1869, an election was held pursuant to said order in said county and subject to all the terms, provisions, and conditions of said order, and that all the authority, or pretence of authority, conferred by said election, or the result thereof in said board, was subject to the conditions and terms aforesaid, and that said commissions had no authority to issue any bonds to the said St. Louis, Lawrence, and Denver Railroad Company, except upon full compliance by said railroad company with said terms and conditions as hereinbefore set forth and the construction and completion of the railroad of said company as hereinbefore specified.

That no other election was ever held in said county, to deter-
21 mine the question whether said county should take stock in, or
issue bonds to said railroad company, and no action of the board
of county commissioners was ever had determining the result of any
such other election, or that any such other election had resulted in favor
of the issue of such bonds.

That, on the 3rd day of June, 1869, the said board, by an agreement made under color of said order and election, and entered of record in the record of their proceedings of said board, agreed with said railroad company to issue and deposit in escrow, in the 2nd National Bank of St. Louis, Missouri, bonds of said county in favor of said railroad company to the amount of one hundred thousand dollars, and the said railroad company agreed to build and complete said line of railroad within said time within the limits of said county.

That said commissioners, under color of said order for an election *election* thereunder and agreement, did execute and deposit in the 2nd National Bank of St. Louis, Missouri, certain instruments purporting to be bonds of said county for the sum of $100,000, purporting to bear interest at the rate of 7 %, payable semi-annually, and with coupons for such interest thereto attached.

22 That said railroad company having failed to comply with the
agreement and terms and conditions of the order aforesaid, said
instruments were returned to said commissioners on or about the
day of , 187 .

That, on or about the 23d day of December, 1870, the persons then constituting the board of county commissioners of said county made an agreement, purporting to be the agreement of said board, with said railroad company, and entered the same of record on the records of said board, by which they undertook to deliver said bonds to said company if said company should have completed said railroad within the limits of said county by the first day of October, 1871.

And that, afterwards, on the 2d of February, 1871, the said persons made and entered of record on the record of the proceedings of said board an order, purporting to be an order of said board, extending the time within which said company might complete said railroad and receive said bonds to the first day of January, 1872, and that thereupon, on the fourth day of March, 1871, the said instruments purporting to be bonds were again deposited with the 2nd National Bank of St. Louis, Missouri, for said railroad company.

23 That, afterwards, on the 23rd day of May, 1871, the said persons composing said board made an order and entered the same on the records of said board, purporting to be an order of said board, directing the 2nd National Bank of St. Louis, Missouri, to deliver to said railroad company $50,000 in said bonds on the certificate of the chief engineer of said company that the grading and masonry on said railroad had been completed from the east line of Johnson County to the city of Olathe, and the remaining $50,000 of said bonds on the certificate of said engineer that the grading and masonry on said railroad had been completed from the city of Olathe to the west line of Johnson County; that, in pursuance of said last order, said instruments purporting to be bonds were delivered to said railroad company.

That Olathe is the county-seat of Johnson County, and situate near the center of said county.

That the railroad of said company was not graded, bridged, tied, ironed, or ready to be operated from Lawrence via De Soto to Olathe by the first day of January, 1871, nor was said railroad graded, bridged, tied, ironed, or ready to be operated by the first day of April, 1871, from Olathe to the east line of said county; that no part of said railroad had been so graded, bridged, tied, ironed, or ready to be
24 operated within the limits of the county of Johnson aforesaid
by the first day of April, 1871, nor when said instruments purporting to be bonds were delivered to said railroad company.

That the instruments executed and delivered as aforesaid, and purporting to be the bonds of Johnson County, are the instruments mentioned and described as bonds in the petition herein, and that the instruments described and declared on as coupons in said petition are coupons attached to said pretended bonds, and none others.

That the plaintiff herein received said pretended bonds and coupons, and all of them, with full notice of the said order of January 25, 1869, and of the terms thereof, and of each of the several agreements and orders hereinbefore mentioned and set forth, and of the terms thereof, and of all the several matters and facts hereinbefore stated, as hereinbefore set forth, and had actual knowledge of the same.

That said plaintiff is not the holder for value of said pretended bonds or coupons, or any of them, but received the same without any consideration paid by him therefor.

Wherefore defendant prays judgment that it be discharged and recover its costs.

COBB & COOK,
DERENNEY & GREEN,
For Defendant.

25 (Endorsed:) No. 735. Derrick A. January vs. the Board of County Commissioners of the County of Johnson. Answer of defendant. Filed October 15th, 1873. A. S. Thomas, clerk.

And on this day, to wit, October 23d, 1873, the said plaintiff filed in the clerk's office of said court his demurrer in said entitled cause, which demurrer, with the endorsements thereon, is in the words and figures following, to wit:

Demurrer.

In the circuit court of the United States for the district of Kansas.

DERRICK A. JANUARY
v.
THE BOARD OF COUNTY COMMISSIONERS OF Johnson County.
} Demurrer.

The plaintiff demurs to the second (2d) sections of the answer.

1. Because the bonds recite that they were issued in pursuance of an act of the legislature and a vote of the people, and the county is stopped by the recital, and the holder is not bound to look beyond the authority to issue.

2. The petition avers the payment of an instalment of interest after the issue and delivery of the bonds and by that act the county is estopped from setting up any irregularity in their issue. It is only necessary for the holder to know that there is a law authorizing 26 their issue.

3. The plaintiff demurs to the third section of the answer because the bonds recite that they were issued in pursuance of law, and such recital estopps the defendant from setting up any irregularity in their issue.

4. Because the petition avers that after the issue an instalment of interest was paid, and this is not denied, and it is an estoppel against the defence set up.

GRANT & SMITH,
Attys. for Plff.

(Endorsed:) No. 735. Derrick A. January vs. Bd. Co. Coms. Johnson Co. Demurrer to answer. Filed October 23d, 1873. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, A. D. 1873, there were present Hon. John T. Dillon, judge, and the following proceedings, amongst others, were had, and appear of record, in the words and figures following, to wit:

Journal entry.

TUESDAY *December 2d,* 1873.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE County of Johnson, Kan.
} 735. Action on coupons.

27 This cause came on to be heard on the demurrer of the plaintiff to the second and third sections of the defendant's answer, Grant for the plaintiff, Cobb for the defendant, and on argument of the demurrer, the plaintiff asked and obtained leave to withdraw his demurrer and file a replication to the said sections of the answer.

And on this day, to wit, December 2d, 1873, the said plaintiff filed his replication to answer in the clerk's office of said court in the said entitled cause; which replication to answer, with the endorsements thereon, is in words and figures following, to wit:

Replication to answer.

U. S. C. C. dis. Kansas.

D. A. JANUARY
v.
THE BOARD OF COMMISSIONERS OF JOHNSON County.

1. The plaintiff, for replication to the second and third sections of the answer of the defendant, answer, denies each and every allegation of each of said sections of said answer.

2. And for further replication to the defences set up in said sections, the plaintiff says that, on the 21 of March, 1872, the said bonds to which
said coupons were attached were duly registered in the office of
28 the auditor of state, under and by authority of the provisions of
the act of 2 March, 1872, of the State of Kansas, entitled "An act to authorize counties, cities, and municipal townships, etc., and providing for the registration of such bonds, etc., and the said auditor of state did endorse in writing on each of said bonds the following words: I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that said bond has been duly registered in my office in accordance with an act of the legislature entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads or other works of internal improvements, and providing for the registration of such bonds, and the repealing of all laws in conflict therewith.

Approved March 2, 1872.

Witness my hand and official seal this 21 March, 1872.

[L. S.] A. THOMAN,
Auditor of State.

And by reason of said act and register the plaintiff became entitled to the benefits of said act, and the defendant is estopped from making the defences set forth in said sections of said answer.

GRANT & SMITH,
For Plff.

29 (Endorsed:) No. 735. D. A. January vs. The Board of Com. of Johnson. Replication to answer. Filed Dec. 2d, 1873. A. S. Thomas, clerk. Grant & Smith.

And on this day, to wit, December 3d, 1873, the said defendant filed in the clerk's office of the said court his demurrer to reply in said entitled cause; which demurrer to reply, with the endorsements thereon, is in words and figures following to wit:

Demurrer to reply.

DERRICK A. JANUARY
vs.
THE BOARD OF COUNTY COMMISSIONERS OF
Johnson County.

Now comes the defendant and demurs to the second count and section of the plaintiff's reply, and says that the same does not state sufficient facts to preclude the defendant from its defences set up in its answer, or any thereof.

COBB & COOK, & DEVENNEY & GREEN,
Attys. for Deft.

(Endorsed:) No. 735. Derrick A. January vs. The Board of Co. Coms. of the Co. of Johnson. Demurrer to reply. Filed Dec. 3, 1873. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America in and
for the district of Kansas, begun at, held at the city of Topeka in said
district, on Monday, the 24th day of November, A. D. 1873, there
30 were present Hon. John F. Dillon, judge, and the following pro-
ceedings, amongst others, were had, and appear of record in the
words and figures following, to wit:

Journal-entry.

THURSDAY, *December* 4, 1873.

DERRICK A. JANUARY
v.
THE BOARD OF COMMISSIONERS OF THE COUNTY of Johnson.
735.

Now come the parties hereto, by their attorneys, and the defendant, with the consent of the court, withdraws its demurrer to the plaintiff's reply herein, and this case is continued to the next term of this court.

And on this day, to wit, January 6th, 1874, the defendant, by its attorneys, filed in the clerk's office of said court its agreement, as to coupons of 1873 & 1874, in said entitled cause; which agreement, with the endorsements thereon, is in the words and figures following, to wit:

Agreement as to coupons of 1873 & 1874.

In U. S. circuit court, district of Kansas.

DERRICK A. JANUARY
v.
THE BOARD OF COUNTY COMMISSIONERS OF
Johnson County, Kansas.
No. 735.

This agreement is to certify that we make no objection to the
31 coupons falling due on 1st January, 1874, since the commence-
ment of this suit, being placed in suit with the others by amend-
ments, upon the condition that the answer and all other pleadings here-

tofore filed in said suits by the defendants shall have the same application to said amendment as to the original petition.

COBB & COOK,
Attys. for Deft.

(Endorsed:) No. 735. D. A. January vs. Board Com. Johnson County, Kansas. Agreement as to coupons of 1873 & 1874. Filed Jan. 6th, 1874. A. S. Thomas, clerk.

And on this day, to wit, January 6th, 1874, the said plaintiff filed in the clerk's office of said court his amendment to petition in said entitled cause; which amendment to petition, with the endorsements thereon, is in the words and figures following, to wit:

Amendment to petition.

In the U. S. circuit court for the district of Kansas.

DERRICK A. JANUARY *vs.* THE BOARD OF COMMISSIONERS OF JOHNSON County, Kansas.	No. 735. Amendment to petition.

Now comes the plaintiff, and by consent of counsel files the following further cause of claim:

For, that on the 1st day of July, 1869, the said county of Johnson, 32 the said defendant, by said writings obligatory, numbered and named in the first count of this petition, acknowledged itself bound to pay to the bearer thereof interest on each of said bonds at the rate of 7% per annum on the first days of July and January, in each year thereafter, at the office of treasurer of said county, for which interest-coupons or interest-warrants were annexed to each of said bonds, payable to bearer. And the plaintiff avers that he is the bearer of said bonds, & that an instal'ment of interest of thirty-five dollars on each of said bonds named in said first count, to wit: 6, 7, 8, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, fell due on the 1st day of January, 1874, being 79 coupons of thirty-five dollars each, making a total of $2,765 of interest which fell due on that day, and which the defendant neglected to pay, & by reason whereof became indebted to the plaintiff in said sum, for which, in addition to the amount named in said original petition, the plaintiff asks judgment, with interest and cost.

GRANT & SMITH,
For Pltff.

(Endorsed:) No. 735. U. S. C. C., district of Kansas. D. A. 33 January v. Bd. Com. Johnson Co. Amendment to petition. Filed Jan. 6, 1874. A. S. Thomas, clerk. Grant & Smith, pltffs.

And on this day, to wit, January 30th, 1874, the said plaintiff filed in the clerk's office of said court his additional count on amendment to declaration in said entitled cause; which additional count on amendment to declaration, with the endorsements thereon, is in words and figures following, to wit:

Additional count to amendment to petition.

In U. S. circuit court, district of Kansas, May term, 1874, at Topeka.

DERRICK A. JANUARY
v.
THE BOARD OF COMMISSIONERS, JOHNSON Co., Kansas.
} Additional count to amendment to petition.

Now comes the plaintiff, &, by agreement of counsel first had & obtained, files this his additional count to the declaration herein.

And, for further cause of action, the said Derrick A. January, who avers that he is a citizen of the State of Missouri, complains of the said board of commissioners of Johnson Co., State of Kansas, which he avers to be a municipal corporation created by existing under the
34 laws, & a citizen of the State of Kansas, for that, heretofore, to wit, on the third day of September, A. D. 1866, the said defendant, by its certain writings-obligatory, No. 8 & 10, sealed with its corporate seal, signed by D. M. Williams, its chairman of said board, and attested by F. E. Henderson, its clerk, bearing the said date and here shown to the court, acknowledged itself to be indebted and bound to pay to the Kansas & Neosho Valley Railroad Company, or bearer, the sum of one thousand dollars ($1,000) by each of said bonds, payable in thirty years from the date thereof, at the Ninth National Bank of the city of New York, with interest on said sums of $1,000 at the rate of seven per cent (7%) per annum, payable semi-annually on the first days of January and July in each year, at the same place, and for said interest. Coupons or interest-warrants were annexed to each of said bonds.

And the plaintiff avers that he is the bearer of said bonds and coupons. A copy of one each of said bonds & coupons is annexed hereto and made a part hereof.

And the plaintiff avers that said bonds were executed & delivered to said Kansas & Neosho Valley Railroad Co., in payment of a subscription of said company by said county to the capital stock of said
35 railroad company.

That said bonds were duly registered by the auditor of state under the act approved March 2d, 1872, on the 16th April, 1872. A copy of said registration is annexed hereto and made a part hereof.

The plaintiff further avers that said county of Johnson has paid prior instalments of interest on said bonds.

By reason of the aforesaid premises the defendant has become liable to pay to the said plaintiff the sums hereinafter claimed.

The plaintiff states that there is now due and unpaid, though requested, the instalments of interest which fell due on the first day of January, 1873, being thirty-five dollars ($35) each, on said bonds, Nos. eight & ten, (8 & 10,) making $70; and, also, the instalments of interest which fell due on the first day of July, 1873, off of the same bonds, making $70; and, also, the instalments of interest which fell due on the first day of January, 1874, off of the same bonds, making $70;

Being in all six coupons, of thirty-five ($35) dollars each, making two hundred and ten dollars, ($210,) and interest on said sums from the time each fell due.

36 Whereby the defendant has become liable to pay, & an action has accrued to the plaintiff to have and recover of said defendant the sum of six hundred dollars ($600) debt, and six hundred dollars ($600) damages.

tofore filed in said suits by the defendants shall have the same application to said amendment as to the original petition.

COBB & COOK,
Attys. for Deft.

(Endorsed:) No. 735. D. A. January vs. Board Com. Johnson County, Kansas. Agreement as to coupons of 1873 & 1874. Filed Jan. 6th, 1874. A. S. Thomas, clerk.

And on this day, to wit, January 6th, 1874, the said plaintiff filed in the clerk's office of said court his amendment to petition in said entitled cause; which amendment to petition, with the endorsements thereon, is in the words and figures following, to wit:

Amendment to petition.

In the U. S. circuit court for the district of Kansas.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF JOHNSON County, Kansas.
} No. 735. Amendment to petition.

Now comes the plaintiff, and by consent of counsel files the following further cause of claim:

32 For, that on the 1st day of July, 1869, the said county of Johnson, the said defendant, by said writings obligatory, numbered and named in the first count of this petition, acknowledged itself bound to pay to the bearer thereof interest on each of said bonds at the rate of 7% per annum on the first days of July and January, in each year thereafter, at the office of treasurer of said county, for which interest-coupons or interest-warrants were annexed to each of said bonds, payable to bearer. And the plaintiff avers that he is the bearer of said bonds, & that an instal'ment of interest of thirty-five dollars on each of said bonds named in said first count, to wit: 6, 7, 8, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, fell due on the 1st day of January, 1874, being 79 coupons of thirty-five dollars each, making a total of $2,765 of interest which fell due on that day, and which the defendant neglected to pay, & by reason whereof became indebted to the plaintiff in said sum, for which, in addition to the amount named in said original petition, the plaintiff asks judgment, with interest and cost.

GRANT & SMITH,
For Pltff.

33 (Endorsed:) No. 735. U. S. C. C., district of Kansas. D. A. January v. Bd. Com. Johnson Co. Amendment to petition. Filed Jan. 6, 1874. A. S. Thomas, clerk. Grant & Smith, pltffs.

And on this day, to wit, January 30th, 1874, the said plaintiff filed in the clerk's office of said court his additional count on amendment to declaration in said entitled cause; which additional count on amendment to declaration, with the endorsements thereon, is in words and figures following, to wit:

Additional count to amendment to petition.

In U. S. circuit court, district of Kansas, May term, 1874, at Topeka.

DERRICK A. JANUARY *v.* THE BOARD OF COMMISSIONERS, JOHNSON Co., Kansas.	Additional count to amendment to petition.

Now comes the plaintiff, &, by agreement of counsel first had & obtained, files this his additional count to the declaration herein.

And, for further cause of action, the said Derrick A. January, who avers that he is a citizen of the State of Missouri, complains of the said board of commissioners of Johnson Co., State of Kansas, which he avers to be a municipal corporation created by existing under the
34 laws, & a citizen of the State of Kansas, for that, heretofore, to wit,
on the third day of September, A. D. 1866, the said defendant, by its certain writings-obligatory, No. 8 & 10, sealed with its corporate seal, signed by D. M. Williams, its chairman of said board, and attested by F. E. Henderson, its clerk, bearing the said date and here shown to the court, acknowledged itself to be indebted and bound to pay to the Kansas & Neosho Valley Railroad Company, or bearer, the sum of one thousand dollars ($1,000) by each of said bonds, payable in thirty years from the date thereof, at the Ninth National Bank of the city of New York, with interest on said sums of $1,000 at the rate of seven per cent (7%) per annum, payable semi-annually on the first days of January and July in each year, at the same place, and for said interest. Coupons or interest-warrants were annexed to each of said bonds.

And the plaintiff avers that he is the bearer of said bonds and coupons. A copy of one each of said bonds & coupons is annexed hereto and made a part hereof.

And the plaintiff avers that said bonds were executed & delivered to said Kansas & Neosho Valley Railroad Co., in payment of a subscription of said company by said county to the capital stock of said
35 railroad company.

That said bonds were duly registered by the auditor of state under the act approved March 2d, 1872, on the 16th April, 1872. A copy of said registration is annexed hereto and made a part hereof.

The plaintiff further avers that said county of Johnson has paid prior instalments of interest on said bonds.

By reason of the aforesaid premises the defendant has become liable to pay to the said plaintiff the sums hereinafter claimed.

The plaintiff states that there is now due and unpaid, though requested, the instalments of interest which fell due on the first day of January, 1873, being thirty-five dollars ($35) each, on said bonds, Nos. eight & ten, (8 & 10,) making $70; and, also, the instalments of interest which fell due on the first day of July, 1873, off of the same bonds, making $70; and, also, the instalments of interest which fell due on the first day of January, 1874, off of the same bonds, making $70;

Being in all six coupons, of thirty-five ($35) dollars each, making two hundred and ten dollars, ($210,) and interest on said sums from the time each fell due.

36 Whereby the defendant has become liable to pay, & an action
has accrued to the plaintiff to have and recover of said defendant the sum of six hundred dollars ($600) debt, and six hundred dollars ($600) damages.

Whereupon he sues and prays judgment for said sums & the costs of this action.

GRANT & SMITH,
Attys. for Plaintiff.

(Copy.)

UNITED STATES OF AMERICA,
State of Kansas:

No. 8. *Stock bond of Johnson Co., Kansas.* $1,000.

Thirty years after date Johnson Co. promises to pay to Kansas & Neosho Valley Railroad Co., a corporation organized & created under a general law of the State of Kansas, by virtue of a certificate of incorporation filed & recorded in the office of the secretary of the State of Kansas, under date of March 8th, 1865, or bearer, the sum of one thousand dollars, for value received, with interest at the rate of seven per cent. per annum, payable semi-annually at the Ninth National Bank in the city of New York, from and after the first day of January,
37 1867.

By order of the board of county commissioners of the county Johnson, State of Kansas.

D. M. WILLIAMS,
Chairman Board County Commissioners, Johnson County.

OLATHE, KANSAS, *September 3rd,* 1866.
Attest:
F. E. HENDERSON,
County Clerk.

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine; and that such bond has been duly registered in my office in accordance with an act of the legislature entitled "An act to authorize counties, incorporated cities, & municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvement, & providing for the registration of such bonds, the registration of other bonds, & the repealing of all laws in conflict therewith," approved March 2, 1872.

Witness my hand and official seal this 16th day of April, 1872.

A. THOMAN,
Auditor of State.

OLATHE, KANSAS, *September 6th,* 1867.

Treasurer of Johnson Co. will pay the bearer thirty-five dollars in the city of New York, being semi-annual interest due on the first day of January, 1873, on the bond of the county of Johnson,
38 No. 10, to the Kansas & Neosho Valley Railroad Company, issued in pursuance of an order of the county commissioners of said county, dated September 3rd, 1866.

D. M. WILLIAMS,
Chairman Johnson County Commissioners.
F. E. HENDERSON, *Clerk.*

(Endorsed:) No. 735. In U. S. circuit court, district of Kansas, at Topeka. Derrick A. January v. The Board of Commissioners of Johnson

County, Kansas. Additional count on amendment to declaration. Filed Jan. 30, 1874. A. S. Thomas, clerk. Grant & Smith, attys. for pltffs.

At a term of the circuit court of the United States of America in and for the district of Kansas begun and held at the city of Leavenworth, in said district, on Monday, the first day of June, A. D. 1874, there were present Hon. Samuel F. Miller, John F. Dillon, and C. G. Foster, and the following proceedings, amongst others, were had and appear of record, in the words and figures following, to wit :

Journal of entry.

47 THURSDAY, *June 4th, A. D.* 1874.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE County of Johnson, of the State of Kansas. } 735.

39 Now comes the plaintiff, by his attorneys, and the defendant, by its attorney, also come, and this cause coming on to be heard upon the demurrer to the second section of the plaintiff's reply to the defendant's answer, and after hearing arguments of counsel for the respective parties, said demurrer is sustained, and, motion of plaintiff, leave is given him to amend his petition, which is done, and it is ordered that the answer of the defendant to the plaintiff's petition stand as an answer to the petition as amended, and this case is continued to the next term.

And on this day, to wit, June 5th, 1874, the said plaintiff filed in the clerk's office of said court his amendment and addition to petition in said entitled cause; which amendment and addition to petition, with the endorsements thereon, is in words and figures following to wit:

Amendment to petition.

Circuit court of the United States for the district of Kans.

DERRICK A. JANUARY
v.
THE BOARD OF COMMISSIONERS OF THE COUNTY of Johnson. } Amendment to petition.

Now comes the plaintiff, and, by leave of the court, makes the following amendment and addition to his said petition:

And the plaintiff further says that said county of Johnson, at 40 or before the issue and delivery of said bonds to the said railroad company, accepted and received from said company a certificate of stock, in payment of which said bonds were issued, and has, by itself or assigns, ever since continued to own the same, and said bonds were, on the 21 March, 1872, duly registered with the auditor of state, under the act of 2 March, 1872, and said auditor has duly certified to said bonds, that they were regularly and legally issued, and the plaintiff thereby became entitled to all the benefits of said act of 2 March, 1872.

And the defendant, by reason of said issue of stock, payment aforesaid, and registery of said bonds, has become estopped from denying their validity.

GRANT & SMITH.

(Endorsed:) No. 735. D. A. January v. The Board Commissioners of the County of Johnson. Amendment & addition to petition. Filed June 5th, 1874. A. S. Thomas, clerk.

And on this day, to wit, June 8th, 1874, the said plaintiff filed in the clerk's office of said court his demurrer to answer to amended petition in said entitled-cause, which demurrer to answer to amended petition. with the endorsements thereon, is in words and figures follow-
41 ing, to wit:

Demurrer to answer to amended petition.

U. S. C. C. for district Kansas.

DERRICK A. JANUARY
v.
THE BOARD OF COMMISSIONERS OF JOHNSON County.
Demurrer to 2 & 3rd pleas.

Now comes the plaintiff and demurs to the second section of the answer to the petition as amended, where the defendant sits out a dual vote; and for cause of demurrer the plaintiff says—

1st. It is alleged in the petition & admitted by this section of the answer that the said board issued said bonds, received the stock in the railroad corporation, & paid the prior instalments of interest, and said defendant is by said acts estopped from setting up said defence.

2. The said defence, though a proper one to be made before the issue of the bonds, cannot be made after they are issued. And the plaintiff demurs to the third section or clause of said defence, wherein it is set out that the board extended the time for the completion of the road, to which the votes were voted.

And, for cause of demurrer, the plaintiff says—

1st. It is alleged in the petition that the said board have re-
42 ceived the stock in said road on which the bonds were voted, and has paid the interest on said bonds due before the interest for which this suit is brought; and these facts being admitted by said section of the answer, the defendant is estopped from making said defence.

2. Because the board of commissioners had the right, under the law, to extend the time for completing said road; and the conditions of the vote, in that respect, did not control the board, and the said extension is no defence to an action on the bonds and coupons.

3. The legislature has validated said bonds by act 9 March, '74.

GRANT & SMITH, *for P.*

(Endorsed:) No. 735. January v. Board of Johnson County. Demurrer to answer to amended declaration. Filed June 8th, 1874. A. S. Thomas, clerk.

And on this day, to wit, November 25th, 1874, the said plaintiff filed in the clerk's office of said court his "motion to dismiss as to certain bonds" in said-entitled cause; which motion to dismiss as to certain bonds, with the endorsements thereon, is in words and figures following, to wit:

Motion to dismiss as to certain bonds.

U. S. C. dis. Kansas.

43 DERRICK A. JANUARY
v.
THE BOARD OF COUNTY COMMISSIONERS
of the County of Johnson.

The plaintiff now comes and withdraws from said suit, and dismisses so much of the plaintiff's claim as seeks to recover on the bonds and coupons thereof on bonds No'. 24, 25, & 26 to 40, inclusive, whether the claim is set up in the petition or amendments, the same being 17 bonds.

GRANT & SMITH, *for Plf.*

(Endorsed:) No. 735. D. A. January v. The County of Johnson. Motion of plaintiff to dismiss as to certain bonds. Filed Nov. 25th, 1874. A. S. Thomas, clerk.

And on this day, to wit, Nov. 25th, 1874, the said plaintiff filed in the clerk's office of said court his replication in said-entitled cause; which replication, with the endorsements thereon, is in words and figures following, to wit:

Replication.

U. S. cir. court, dis. Kansas.

DERRICK A. JANUARY
v.
THE BOARD OF COUNTY COMMISSIONERS OF
the County of Johnson.

44 The plaintiff, for replication to all of said answer which sets new matter, denies each and every allegation thereof.

GRANT & SMITH,
For the Plaintiff.

(Endorsed:) No. 735. D. A. January v. The Board of County Commissioners of Johnson County. Replication. Filed Nov. 25, 1874. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun a't held at the city of Topeka, in said district, on Monday, November 23d, A. D. 1874, there were present Hon. John F. Dillon and C. G. Foster, and the following proceedings, amongst others, were had and appear of record, in the words and figures following, to wit:

Journal entry.

WEDNESDAY, *November 25th*, 1874.

DERRICK A. JANUARY
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Johnson, State of Kansas. } 735.

This cause came on now to be heard, Grant for the plaintiff and Cobb & Cook for the defendant; and at the last term, the plaintiff having amended his petition, the defendant filed his answer anew to said amended petition; and at this term the plaintiff demurred to said answer, which demurrer the court overruled; and the plaintiff thereupon replied to said answer; and thereupon the defendant filed
45 an affidavit to continue said cause, and the same is continued at defendant's costs.

At a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, June 7th, A. D. 1875, there were present Hon. Samuel F. Miller and C. G. Foster; and the following proceedings, amongst others, were had and appear of record, in the words and figures following, to wit:

Judgment.

MONDAY, *June 14th*, 1875.

DERRICK A. JANUARY
vs.
THE BOARD OF COMMISSIONERS OF THE COUNTY of Johnson, State of Kansas. } 735.

This cause came on now to be heard on the 10th June, 1875, and is tried by the court, by agreement of counsel, Grant & Smith for plaintiff and Cobb & Cook for defendant; and thereupon the court finds the following conclusions of fact and law:

Special findings by the court.

DERRICK A. JANUARY, PLFF.,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE County of Johnson, deft. } 735.

The court finds as facts in this cause—

46 1st. That, on the 25th day of January, A. D. 1869, the board of county commissioners of the county of Johnson made and entered upon the records of said county an order, of which the following is a copy, to wit:

"Proceedings of the board of county commissioners of the county of Johnson, in the State of Kansas, at a special session, held at Olathe on the 25th day of January, A. D. 1869.

"Board met at 10 o'clock a. m.

"Present, B. F. Hollenbach, chairman, and John Fulcher and John Brady, associate commissioners.

"Called to order by the chairman and proceeded to business.

"Proposition submitted asking that the board make an order authorizing an election to be held to vote bonds to the St. Louis, Lawrence and Denver Railroad and the Kansas City and Santa Fé Railroad; and thereupon the following order was passed in these words, to wit:

"Resolved, That an election of the qualified voters of Johnson County, Kansas, be holden at the different voting precincts of the county, on Tuesday, the 6th day of April, 1869, to decide whether the board of county commissioners of said county shall subscribe one hundred thousand dollars to the capital stock of the St. Louis, Lawrence and Denver Railroad Company, a railroad company incorporated to build a railroad from Lawrence, Kansas, to Pleasant Hill, Missouri, and the 47 further sum of one hundred thousand dollars to the capital stock of the Kansas City and Santa Fé Railroad Company to aid in the construction of a railroad from Olathe via Gardner and Ottawa, Kansas, in the direction of Santa Fé, New Mexico; provided that no part of the said bonds shall be issued to said St. Louis, Lawrence and Denver Railroad Company until said railroad shall be fully graded, bridged, tied, ironed, and ready to be operated from Lawrence via De Soto to Olathe, nor shall any part of said bonds ever be issued to said railroad company unless said portion of said railroad shall be so graded, bridged, tied, ironed, and ready to be operated from Lawrence to Olathe by the first day of January, 1871; nor shall more than fifty thousand dollars of said bonds be issued to said railroad company until the railroad shall be fully graded, bridged, tied, ironed, and ready to be operated from Olathe to the east line of Johnson County in the direction of Pleasant Hill, Missouri; nor shall the second fifty thousand dollars of said bonds ever be issued to said railroad company unless said portion of said railroad, between Olathe and the west line of said Johnson County, shall be so graded, bridged, tied, ironed, and ready to be operated by the 48 first day of April, 1871; and provided further, that none of the bonds of the county shall be issued to said Kansas City and Santa Fé Railroad Company until said railroad shall be fully graded, bridged, tied, ironed, and ready to be operated from Olathe via Gardner to the west line of the county in the direction of Ottawa; nor shall any of said bonds ever be issued to said railroad company unless said railroad shall be so graded, bridged, tied, ironed, and ready to be operated from Olathe to the west line of said county by the said first day of April, 1871. The ballots at said election shall be either written or printed and contain 'For subscription and bonds to the railroads' or 'Against subscription and bonds to the railroads' on the conditions above mentioned, then the board of county commissioners shall subscribe said stock and issue said bonds when said railroads shall be respectively completed as specified in this order. Said election will be held on the 6th day of April, 1869, the day of the township election in said State, and the returns thereof will be made with the returns of the township election, and the county board shall canvass the votes cast at said election on the 13th day of April, 1869. All of said bonds to run thirty years, with interest at seven per cent. per annum.

(Signed) "B. E. HOLLENBACH,
"*Chairman.*"

49 2d. The court finds that on the 13th day of April, 1869, the following proceedings were had by said board, to wit:

"Proceedings of the board of county commissioners of the county of Johnson, in the State of Kansas, at a meeting held in Olathe in said county, on the 13th day of April, 1869.

"Board met at 10 o'clock a. m., according to adjournment. Present, B. F. Hollenbach, chairman, John Bradey & John Fulcher, associates. Called to order by the chairman and proceeded to canvass the votes cast at the election held April 6th, A. D. 1869, in said county and State, and find the result of said election as follows: And we do further find there was cast for issuing bonds to the railroads, 1,301 votes, and against issuing bonds to the railroads 627, there being a majority for issuing bonds to the railroads in the entire county of 674. It is hereby declared that said resolution is carried, and that bonds are authorized to be issued.

"Moved, that we do now adjourn to 8 o'clock to-morrow. Carried.

"B. F. HOLLENBACH,
"*Chairman.*"

3d. The court finds that on the third day of June, 1869, the said board of county commissioners in special session, and the St. Louis,
Lawrence and Denver Railroad Company, made a written agree-
50 ment, and spread the same upon the records of said county,
which agreement was as follows, to wit:

"Board of county commissioners in special session, June 3rd, A. D. 1869.

"Board of commissioners met at one o'clock p. m. Present, John Fulcher and John Brady. The chairman, B. F. Hollenbach, being absent, John Fulcher was appointed chairman pro tem.

"Called to order by the acting chairman, and proceeded to business.

"Gen. George W. Deitzler being present, presented a contract for the consideration and ratification of said board, and, after due consideration, the following contract was entered into, in these words, to wit:

"The agreement made and entered into this the 3rd day of June, A. D. 1869, by and between the board of county commissioners of Johnson County, Kansas, of the first part, and the St. Louis, Lawrence and Denver Railroad Company of the State of Kansas, of the second part, witnesseth:

"That the said party of the first , for and in consideration of the covenants and agreements hereinafter contained, to be kept and performed by the party of the second part, hereby agrees to issue one hundred bonds of the denomination of one thousand dollars of the county of Johnson aforesaid, bearing date July 1st, A. D. 1869, at the office of
the county treasurer of said Johnson County, with interest
51 at the rate of seven per cent. per annum payable annually on
the first day of July of each year, with interest coupons thereto attached, said bonds & coupons payable to bearer, and to deposit the same in escrow in the Second National Bank of Saint Louis, Missouri, fifty thousand dollars of said bonds to be delivered to the said party of the second part, when said Saint Louis, Lawrence and Denver Railroad shall be completed and in full operation from the western boundary of said Johnson County to Olathe, in said county, and the remaining fifty thousand dollars of said bonds to be delivered to the said party of the second part, when said Saint Louis, Lawrence and Denver Railroad shall be completed and in full operation from Olathe in said Johnson County to the eastern boundary of Johnson County, and when full paid, stock in the capital stock of said railroad to the amount of one hundred thousand dollars shall have been issued and delivered to the said board of commissioners of Johnson County; and the said party of the second part agrees that upon the delivery as aforesaid of the said bonds of Johnson County it will issue to the board of county commissioners of Johnson County, Kansas, full-paid capital stock in said Saint Louis,

52 Lawrence and Denver Railroad to the amount of one hundred thousand dollars. It is further agreed that the first fifty thousand dollars of bonds as aforesaid shall be delivered to the Saint Louis, Lawrence and Denver Railroad Company by the Second National Bank of Saint Louis, Missouri, when the said railroad shall be completed and in full operation from the western boundary of said Johnson County, Kansas, to Olathe, in said county, and the remaining fifty thousand dollars of said bonds when the said railroad shall be completed and in full operation from Olathe in said county to the eastern boundary of said county, and when said railroad shall have been accepted by the Missouri Pacific Railroad Company, and their lease of said Saint Louis, Lawrence and Denver Railroad, and when such acceptance shall have been duly certified to said National Bank by the president of the Saint Louis, Lawrence and Denver Railroad, and the board of county commissioners of said Johnson County, Kansas. And it is further agreed by the parties that when it shall be certified to the said Second National Bank of Saint Louis, which is the mutual depositary of the parties hereto, that the said railroad has been built from the western boundary of Johnson County to Olathe in said county, and has been
53 accepted by the said Pacific Railroad Company of Missouri, the said bank shall separate from said fifty thousand dollars of bonds first issued as aforesaid, and retain for the said party of the first part, as many of the first-due coupons on said bonds as shall amount in the aggregate to the interest on $50,000.00 at seven per cent. per annum from July first next until the date or time when such certificate shall be made; and it also further agreed by the parties hereto that, when it shall be certified to the said Second National Bank that the said road has been built from Olathe to the eastern boundary of said Johnson County and has been accepted by the Pacific Railroad Company of Missouri the said bank shall separate from the said fifty thousand dollars of bonds last to be delivered, and retain for the party of the first part, so many of the first-due coupons on said bonds as shall amount in the aggregate to the interest of fifty thousand dollars at seven per cent. per annum from July 1st next until the date or time such certificate last above referred to shall be made.

"In testimony whereof the parties hereto, the Board of County Commissioners of Johnson County, Kansas, and the said Saint Louis, Lawrence and Denver Railroad Company, by its president, have here-
54 unto set their hands and corporate seals, this the third day of June, A. D. 1869, at Olathe, Johnson County, State of Kansas.

(Signed) "JOHN FLETCHER, [L. S.]
"*Chairman pro tem.*
"JOHN BRADY, *Associate.*

"Attest:

"F. E. HENDERSON,
"*County Clerk.*

(Signed) "THE ST. LOUIS, LAWRENCE AND DENVER RAILROAD COMPANY,
"By its president, GEORGE W. DEITZLER. [L. S.]

"There being no further business, it was moved that we do now adjourn. Carried.

(Signed) "JOHN FLETCHER,
"*Chairman pro tem.*

"Attest:

"F. E. HENDERSON,
"*County Clerk.*"

4th. The court finds that on the 23rd day of December, 1870, the said board of county commissioners in session had the following proceedings, and it and the said railroad company made the following supplemental contract, which proceeding and contract they then caused to be spread upon the records of said county, to wit:

"Board of county commissioners, special session, Dec. 23rd, A. D. 1870.

"Board met pursuant to a call from the chairman for the purpose of confer'ing with George W. Deitzler, president of the St. Louis, Lawrence and Denver Railroad Co., in regard to the bonds issued in aid of said railroad, Mr. Deitzler asking that the time on said bonds be extended to the first day of October, 1871.

55 "Wherefore the board of county commissioners doth find that one hundred thousand dollars in bonds were on the 6th day of April, 1869, voted by the election of Johnson County, Kansas, to the Saint Louis, Lawrence and Denver Railroad Co.; that a contract was entered into between the board of county commissioners of Johnson County, Kansas, and the St. L. L. & D. R. R. Co., for the erection and completion of said road, bearing date of the 3rd of June, 1869, following the conditions of said vote aforesaid, and that said railroad company, in pursuance of said contract, commenced work on said road, but were prevented, by circumstances which could not be controlled, from completing the said road within the time specified in said vote and contract; that the railroad company now proposes to resume work on said road aforesaid, and complete the same by the first day of October, 1871; that the said railroad, in aid of which said bonds were voted, is of permanent importance to Johnson County, therefore the board entered into the following supplemental contract with the said railroad company.

"This supplemental contract and agreement, made and entered into this 24th day of December, A. D. 1870, by and between the
56 board of county commissioners of Johnson County, Kansas, party of the first part, and the St. Louis, Lawrence and Denver Railroad Company, party of the second part; the same to be a part of, and supplemental to, a contract *contract* entered into between the same parties of the same part to the agreement of June 3rd, 1869; that the bonds mentioned in said agreement as aforesaid mentioned be, and the same is hereby, agreed to be redeposited in the 2d National Bank of St. Louis, Mo., whenever work has been resumed by said company or their contractors, and to be delivered by said 2d National Bank of St. Louis, Lawrence and Denver Railroad Company, whenever said railroad has been completed in accordance with said contract of June 3rd, 1869. And is further agreed that the time of building and completing said St. Louis, Lawrence and Denver Railroad, as stated in said contract of June 3d, 1869, be and the same in all its terms and conditions is hereby extended so that said railroad may be built and completed, and that said bonds may be delivered as set forth in said agreement of June 3rd, 1869, on or before the 1st day of October, A. D. 1871. And it is further agreed by the parties hereto, that the agreement made and entered into June 3d, 1869, between the St. Louis, Lawrence and Denver
57 Railroad Company and the Co. commissioners of Johnson County, Kansas, is hereby accepted in all its terms, conditions, and agreements. It is further agreed by and between the parties of the first part and the parties *and* second part, that the said St. Louis, Lawrence and Denver Railroad Company shall build a freight and passenger depot at or as near as practicable where said railroad shall cross the public

highway leading from the town of Aubry, Johnson County, Kansas, to Kansas City, Missouri; and further that the railroad company shall build and construct said St. Louis, Lawrence and Denver Railroad through the township of Aubry, Johnson County, Kansas, if at all as practicable as by any other route. It is further agreed by and between the parties of the first and second part, that if the terms and conditions of this contract are not fulfilled and complied with by the first day of October, A. D. 1871, then the said bonds, referred to above, shall be returned to Johnson County, Kansas, upon the order of the board county commissioners of Johnson County, Kansas.

"In testimony whereof the parties hereto, the board of county commissioners of Johnson County, Kansas, and the said St. Louis, Lawrence and Denver Railroad Company, by its president, have hereunto
58 set their hands and corporate seals this 24th day of December, A. D. 1870, at the city of Olathe, Johnson County, Kansas.

"JOHN BRADY,
"*Chairman.*

"Attest: JOHN F. TAYLOR, *Clk.*

"The St. Louis, Lawrence and Denver Railroad Company, by its president."

5th. The court finds that, on the 23rd day of May, 1871, the said board made and spread upon their records the following order, to wit:

"Board of county commissioners in special session, 9 a. m., May 22d, 1871.

"Board met pursuant to a call of the chairman, all the members being present; proceeded to business and made the following order, to wit:

"Ordered, that the Second National Bank of Saint Louis, Missouri, deliver to the president of the Saint Louis, Lawrence and Denver Railroad Company fifty thousand dollars, (50,000.00,) of the bonds of Johnson County, Kansas, (now deposited in escrow in said bank,) when it shall have been certified to said bank by the chief engineer of said Saint Louis, Lawrence and Denver Railroad Company that the grading and masonry has been completed from the eastern boundary of Johnson County, Kansas, to the city of Olathe, County and State aforesaid, and the president of said Saint Louis, Lawrence and Denver Railroad
59 Company shall produce the receipt of the board of county commissioners of said county for fifty thousand dollars, ($50,000.00,) of full-paid capital stock in said St. Louis, Lawrence and Denver Railroad.

"And further ordered that said Second National Bank of Saint Louis, Mo., deliver to the president of the said Saint Louis, Lawrence and Denver Railroad Company, the remaining fifty thousand dollars of bonds of Johnson County, Kansas, when it shall have been certified to said bank by the chief engineer of said Saint Louis, Lawrence and Denver Railroad Company that the grading and masonry has been completed from said Olathe City to the western boundary of said county of Johnson, State of Kansas, and the president of said Saint Louis, Lawrence and Denver Railroad Company shall produce the receipt of the board of county commissioners of said Johnson County, Kans., for the remaining fifty thousand dollars, ($50,000.00,) of full-paid-up capital stock in said Saint Louis, Lawrence and Denver Railroad.

"And further ordered that the said bank shall detach from said bonds coupons to the amount of the interest due up to the first day of November, A. D. 1871.

"JOHN BRADY, *Chairman.*

"Attest: JOHN F. TAYLOR, *Co. Clerk.*"

60 6th. The court finds that there are no other records or proceedings by authority of which the bonds in suit could have been issued than those aforesaid.

7th. That the said Saint Louis, Lawrence and Denver Railroad was not graded, bridged, tied, ironed, and ready to be operated from Lawrence to Olathe by the 1st day of January, 1871, nor was any part of said railroad within said county graded, bridged, tied, ironed, and ready to be operated by the 1st day of April, 1871.

8th. That the bonds and coupons in suit were deposited in escrow in the 2d National Bank in the city of St. Louis, Missouri, in accordance with the terms of the contract of June 3rd, 1869, and the supplemental contract of December 23rd, 1870, above set forth, together with a copy of the aforesaid orders and contracts, and that afterwards, under color of the order of May 22d, 1871, aforesaid, said bonds and coupons were delivered to said railroad company before any portion of said railroad had been graded, bridged, tied, ironed, and ready to be operated within said county of Johnson, but after the grading and masonry had been done as required by said last-named order.

9th. The plaintiff holds the bonds and coupons in suit as a
61 purchaser for value before said bonds or coupons were due and
without notice of any defect in the proceedings under which said bonds were issued, or in the bonds other than what appears upon said bonds and coupons.

10th. The defendant before the commencement of this action, and after the plaintiff acquired the bonds in suit, paid interest thereon.

11th. The said railroad company delivered to the county commissioners of said county certificates of the capital stock mentioned in said records, but the county has never received any dividends nor anything on account of the same, nor has it ever interfered in any way with the management of said road, nor claimed, received, or exercised any of the rights, powers, or advantages of a stockholder therein.

12th. The said railroad was, after the delivery of said bonds, completed and has been in operation ever since its completion.

The court finds, as conclusion of law from the foregoing facts, that plaintiff is entitled to recover the amount of the coupons described in the petition, and interest thereon from the maturity of said coupons at 7 per cent. per annum; to which conclusion and judgment of law the defendant at the time duly excepted.

SAM. F. MILLER.

62 And thereupon, by consent of counsel, a count is filed in the January, 1875, coupons of the six-two bonds declared upon, and the clerk is ordered to assess the plaintiff's damages, who assessed the same at the sum of eleven thousand nine hundred and forty-seven & $\frac{10}{100}$ dollars, ($11,947$\frac{10}{100}$,) which sum, with interest, from 10 June, 1875, it is ordered and adjudged that the plaintiff have and recover of the defendant, with costs, taxed at $.

63 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings had in the case of Derrick A. January vs. The Board of County Commissioners of the County of Johnson, of the State of Kansas, No. 735, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 23d day of August, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

64 Know all men by these presents that we, the County of Johnson as principal and Josiah E. Hays and S. A. Christy as sureties, acknowledge ourselves to be indebted to Derrick A. January in the penal sum of two thousand dollars lawful money of the United States, to the payment whereof we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals, and dated this 16th day of October, A. D. 1875.

Whereas at the last term of the circuit court of the United States, held in the district of Kansas, a judgment was rendered in said court in favor of Derrick A. January against the Board of County Commissioners of said county for the sum of eleven thousand nine hundred and forty-seven $\frac{10}{100}$ dollars (11,947$\frac{10}{100}$$) and costs of suit.

And whereas the said County of Johnson, by its board of county commissioners, is about to sue out a writ of error from the Supreme Court of the United States to reverse said judgment:

Now, therefore, the condition of this obligation is such that if the said County of Johnson shall prosecute said writ of error to effect, and if it fail to make its plea good, shall answer all costs, then this obligation shall be void; otherwise to remain in full force and virtue.

As witness the hands of the Board of County Commissioners of Johnson County, and the seal of said county, as well as the hands and seals of said sureties.

V. R. ELLIS,
Chairman pro tem.,
J. A. HIBBIRD,
Associates.

The Board of County Commissioners of the county of Johnson, State of Kansas, sureties.

65
J. E. HAYS. [L. S.]
S. A. CHRISTY. [L. S.]

STATE OF KANSAS,
County of Johnson, ss:

Josiah E. Hays and S. A. Christy being duly sworn, say, each for himself, that he is worth the sum of one thousand dollars over and above all just debts, liabilities, and exemptions.

J. E. HAYES.
S. A. CHRISTY.

Subscribed and sworn to before me this day of October, A. D. 1875.
[SEAL.]
JOS. MARTIN,
County Clerk.

ATCHISON, *Oct.* 27, 1875.

I hereby approve the above bond & the sureties thereto.

C. G. FOSTER, *Judge.*

[Endorsed:) No. 735. The Board of County Commissioners of the county of Johnson vs. Derrick A. January. Bond for writ of error. Filed Oct. 29, 1875. A. S. Thomas, clerk.

66 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the bond for writ of error in said entitled case No. 735, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 16th day of November, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between Derrick A. January and the Board of Commissioners of the county of Johnson, State of Kansas, No. 735 in said court, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

68 Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 21st day of October, A. D. 1875.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

NELSON COBB,
Attorney for Plff. in Error.

Allowed:

C. G. FOSTER, *Judge.*

(Indorsed:) No. 735. Derrick A. January vs. The Board of County Commissioners of the county of Johnson, Kans's. Writ of error. Filed Oct., 29, 1875. A. S. Thomas, clerk.

69 UNITED STATES OF AMERICA, *ss:*

To Derrick A. January, greeting:

You are hereby cited and admonished to be and appear at our Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein the board of county commissioners of the county of Johnson is plaintiff, and you are defendant in error, to show cause, if any there by, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this twenty-eighth day of October, A. D. 1875.

C. G. FOSTER,
U. S. Dist. Judge, one of the Justices of the said Circuit Court.

Due & legal service of the above is hereby accepted this 1st day of November, 1875.

GRANT & SMITH,
Attys. for Plff.

(Indorsed:) Citation. Filed Nov. 15, 1875. A. S. Thomas, clerk.

71 Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF the county of Johnson
vs.
DERRICK A. JANUARY.
} In error.

Of October term in the year of our Lord one thousand eight hundred and seventy-*six*, afterward, to wit, on the 2nd Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said board of county commissioners of the county of Johnson, by Nelson Cobb, its attorney, and says that in the record there is manifest error in this, to wit, that the petition aforesaid and the matters therein contained are not sufficient in law for the said Derrick A. January to have or maintain his aforesaid action thereof against the said board of county commissioners of the county of Johnson.

There is also manifest error in this, to wit, that by the record aforesaid it appears that the said circuit court found and determined 72 as matter of law, upon the facts found by said court, that the plaintiff was entitled to judgment, whereas upon the facts so found by the law of the land the plaintiff was not entitled to judgment.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Derrick A. January, against the said board of county commissioners of the county of Johnson, whereas by the law of the land the judgment ought to have been given for the said board of county commissioners of the county of Johnson, against the said Derrick A. January, and the said board of county commissioners prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by reason of the said judgment, &c.

NELSON COBB,
Attorney for Plaintiffs in Error.

(Indorsed:) No. 735. The Board of County Commissioners of the county of Johnson vs. Derrick A. January. Assignment in error. Filed Nov. 11, 1875. A. S. Thomas, clerk.

(Indorsement on cover:) No. 874. The Board of Commissioners of the county of Johnson, plaintiffs in error, vs. Derrick A. January. Kansas. C. C. U. S. Filed 20th December, 1875.

○

Supreme Court of the United States.

NO. 874.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON,
Plaintiff in Error.
VS.
DERRICK A. JANUARY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Statement of the Case, Assignment of Error, Brief and Argument for Plaintiff in Error.

Kansas City Journal, Printers.

SUPREME COURT OF THE UNITED STATES.

NO. 874.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON,
Plaintiff in Error.

VS.

DERRICK A. JANUARY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Statement of the Case, Assignment of Error, Brief and Argument for Plaintiff in Error.

STATEMENT OF THE CASE.

This was an action brought by Derrick A. January against the Board of County Commissioners of the County of Johnson, a municipal corporation created by the laws of the State of Kansas, on coupons from bonds alleged to have been issued by the County of Johnson, Kansas, to the St Louis, Lawrence and Denver Railroad Company.

The pleadings in the case raise the issues determined in the special finding.

The cause was tried by the Court and a special finding of facts made by the Court, and on this finding of facts the Court found that plaintiff was entitled to judgment, and rendered judgment accordingly.

It is proper to state that this case was tried before Justice Miller, at the June Term, 1875. A cause between William M.

Kaiser and the County of Johnson had been previously tried in the same court, before Judge Dillon, and a recovery had upon some coupons of the same issue of bonds upon evidence the same as in this case. These facts being stated to Justice Miller he decided this case upon the authority of the Kaiser case, without further investigation, finding the facts as agreed by counsel, expressly reserving his personal opinion until the case should reach the Supreme Court.

The bonds and coupons are described in the declaration—a copy being set out at length, with endorsement and copy of coupon, in pages 2 and 3 of the record, as printed for the use of this court.

The special findings are set out in full, pages 20 to 26 inclusive of the printed record.

From these it appears:

That on January 25, 1869, an order was made by the Commissioners of Johnson County for an election to be held in that county, April 6, 1869, on the question whether the Board of County Commissioners should subscribe one hundred thousand dollars to the capital stock of the St. Louis, Lawrence and Denver Railroad Company, and a like amount to the Kansas City and Santa Fe Railroad Company, and issue bonds in payment of these subscriptions.

The question submitted to the voters, so far as relates to the bonds in suit, was "to decide whether the Board of County Commissioners of said county shall subscribe one hundred thousand dollars to the capital stock of the St Louis, Lawrence and Denver Railroad Company; * * * * provided that no part of the said bonds shall be issued to said St. Louis, Lawrence and Denver Railroad Company until said road shall be fully graded, bridged, tied, ironed and ready to be operated from Lawrence, via De Soto, to Olathe, *nor shall any part of said bonds ever be issued* to said railroad company unless said portion of said railroad shall be so graded, bridged, tied, ironed and ready to be operated from Lawrence to Olathe by the first day of January, 1871; nor shall more than fifty thousand dollars of said bonds be issued to said railroad company until the railroad shall be fully graded, bridged, tied, ironed and ready to be operated from Olathe to the east line of Johnson County, nor *shall the second fifty thousand dollars of said bonds ever be issued to* said railroad company unless said portion of said railroad between Olathe and the west line of said Johnson County shall be fully graded, bridged, tied, ironed and ready to be operated by the first day of April, 1871."

There were similar conditions in regard to issuing bonds to the other company, and the order proceeds:

"The ballots at said election shall be either written or printed, and contain 'For Subscription and Bonds to the Railroads,' or 'Against Subscription and Bonds to the Railroads,' On the conditions above mentioned, then the Board of County Commissioners shall subscribe said stock, and issue said bonds when said railroads shall be respectively completed, as specified in this order."

See the order at length in special finding (printed record, page 21).

It appears from this order, that two distinct propositions for subscription and issue of bonds were united in one question proposed to be voted upon, and that all who voted for one subscription and issue of bonds were compelled to vote for the other also.

It also appears that the authority to be conferred on the Commissioners to subscribe or issue bonds to the St. L., L & D. R. R. Co. was limited by the terms of the order for an election. and by the vote itself to the following contingencies:

No bonds were ever to be issued unless the road was completed from Lawrence to Olathe by January 1, 1871. When so far completed, if at or before that time, then $50,000 of the bonds were to be issued. The second $50,000 were subject to the further condition that they were never to be issued unless the road was completed through the county by April 1, 1871. When so completed, if before that time, the second $50,000 were to be issued, and, by the last clause above quoted, the Commissioners were to *subscribe the stock*, as well as issue the bonds, "when said railroads shall be respectively completed as specified in this order."

The finding shows that the election was held and the proposition carried.

On June 9, 1869, the Railroad Company and the Board of County Commissioners made an agreement for a subscription by the County to the stock of the Company, and issue of bonds to pay for the same. The bonds were to be printed and deposited in *escrow* in St. Louis, to be delivered to the Company in installments of $50,000 as the work of building the road was completed.

The agreement is set forth at length in the finding (printed record, pp. 22 and 23.)

On December 23, 1870, the Board of County Commissioners and the Railroad Company made a supplemental agreement extending the time within which the road was to be built, in order to entitle the Company to the bonds, till October 1st, 1871.

See the agreement in full, printed record, pp. 24–25.

On the 22d day of May, 1871, the Board made an order that the bank holding the bonds in *escrow* should deliver them to the Railroad Company in installments of fifty thousand dollars each, the first when the Engineer of the Railroad Company should certify that the *grading and masonry* on the road was done to Olathe from the east line of the county, and the second when the *grading and masonry* was done from Olathe to the west line of the county, and on receipts from the County Board that stock certificates in like amount had been delivered them.

See the order in full, printed record, pp. 25-26.

There is no record or proceeding by authority of which the bonds in suit could have been issued, except the orders, election and agreements above stated, and the bonds in suit are the bonds deposited in *escrow* in St. Louis under the order and agreements above referred to.

No part of the railroad was graded, bridged, tied, ironed and ready to be operated within the county by January 1, 1871, nor by April 1, 1871, nor when the order of May 22 was made, nor when the bonds were delivered out of *escrow* to the Railroad Company. They were delivered under color of the last-mentioned order when the *grading and masonry* were completed, and this was after the whole road within the county should have been completed under the terms of the order for election.

The road was completed after the delivery of the bonds.

The County Commissioners received the certificates of stock in the company, but the county has never received anything for or on account of them, and has never claimed, received or exercised the rights, powers or advantages of a stockholder.

The plaintiff is a holder for value without notice of any defect in the proceedings under which the bonds were issued, or in the bonds, other than *what appears upon the bonds themselves.* The county, before the coupons matured on which suit is brought, and *after plaintiff had acquired these bonds*, paid interest on them.

The bonds in suit are made payable to the Railroad Company or bearer, and, in addition to the promise to pay and *testimonium* clause, contain the following recital and no other:

"This bond is executed and issued by virtue of and in accordance with the act of the Legislature of the State of Kansas entitled 'An act to authorize counties and cities to issue bonds to railroad companies," approved February 25th, 1868, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the County of Johnson, at a regular election held on the sixth (6th) day of April, 1869."

See copy of bond, printed record, pages 2 and 3.

The plaintiff relies upon this recital, and sets up the same in his declaration (printed record, p. 2.)

ASSIGNMENT OF ERROR.

The error asserted and relied upon by the plaintiff in error here, is found in the conclusion of law made by the court upon the special finding of fact in the case; and the question submitted to this Court is whether, upon the facts so found, the defendant in error is entitled to recover on these bonds.

On June 9, 1869, the Railroad Company and the Board of County Commissioners made an agreement for a subscription by the County to the stock of the Company, and issue of bonds to pay for the same. The bonds were to be printed and deposited in *escrow* in St. Louis, to be delivered to the Company in installments of $50,000 as the work of building the road was completed.

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The plaintiff is a holder for value without notice of any defect in the proceedings under which the bonds were issued, or in the bonds, other than *what appears upon the bonds themselves.* The county, before the coupons matured on which suit is brought, and *after plaintiff had acquired these bonds*, paid interest on them.

The bonds in suit are made payable to the Railroad Company or bearer, and, in addition to the promise to pay and *testimonium* clause, contain the following recital and no other:

"This bond is executed and issued by virtue of and in accordance with the act of the Legislature of the State of Kansas entitled 'An act to authorize counties and cities to issue bonds to railroad companies," approved February 25th, 1868, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the County of Johnson, at a regular election held on the sixth (6th) day of April, 1869."

See copy of bond, printed record, pages 2 and 3.

The plaintiff relies upon this recital, and sets up the same in his declaration (printed record, p. 2.)

ASSIGNMENT OF ERROR.

The error asserted and relied upon by the plaintiff in error here, is found in the conclusion of law made by the court upon the special finding of fact in the case; and the question submitted to this Court is whether, upon the facts so found, the defendant in error is entitled to recover on these bonds.

Upon this state of facts we submit the following

POINTS AND AUTHORITIES.

I.

The Board of County Commissioners of Johnson County could make a valid subscription to stock of a railroad company, and issue bonds in payment thereof, only when authorized by some express statute of the State.

Thomson *vs.* Lee County, 3 Wall., 327.

1. The law of February 25, 1868, recited in the bonds, gave no authority for their issue.

At the time these bonds were made and issued there was no act of the Legislature of Kansas entitled "An act to authorize counties *and cities* to issue bonds to railroad companies" in force; nor any act approved February 25, 1868, which conferred any authority upon municipalities to issue bonds except the one hereafter set out.

There was then upon the Statute Book an act entitled "An act to authorize counties to issue bonds to railroad companies," which was approved February 25, 1868, and is to be found in General Statutes of Kansas, pp. 892–3.

This is undoubtedly the act referred to in these bonds. It is the only act then on the Statute Book or in force with the same or a similar title, and the only act on the subject approved February 25th, 1868.

That act is in these words:

"*An Act to Authorize Counties to issue Bonds to Railroad Companies:*

§1. Commissioners may issue county bonds to railroad company when

2. Shall levy tax to pay interest and create a sinking fund.

§3. Commissioners to elect one of their number to cast the vote of the county at election for Directors.

4. Provisions of this act applicable in what cases.

Be it enacted by the Legislature of the State of Kansas:

Commissioners may issue county bonds to railroad company, when.

SECTION 1. Whenever a majority of the persons voting at any election called by the Board of County Commissioners of any county have heretofore voted in favor of subscribing stock and issuing bonds to any railroad company or companies, the Board of county commissioners of such county may subscribe to the capital stock of such railroad company or companies to the amount, and on the conditions specified in the order of such Boards of County Commissioners in such cases, and pay such subscription by issuing to each company bonds of such county at par, payable at a time therein to be fixed, not exceeding thirty years from the date thereof, bearing interest at the rate of seven per cent. per annum, with interest coupons attached, whether such orders and elections or either of them have been in compliance with the Statutes in such cases made and provided or not, or whether the proposition submitted at the election had, was for the subscription of stock and the issuance of bonds to one or more railroad companies.

Shall levy tax to pay interest and create a sinking fund.

SEC. 2. The Board of County Commissioners of such counties shall, annually, levy and collect, at the same time and in the same manner that general taxes are levied and collected, a tax sufficient to pay the annual interest on such bonds and to create a sinking fund for their redemption.

Commissioners to elect one of their number to cast the vote of the county at the election of directors.

SEC. 3. The Board of County Commissioners of such county shall elect one of their number, who shall not be a stockholder, to cast the vote of the county at any election for directors, or at any meeting of the stockholders of such company.

Provisions of this act applicable in what cases.

SEC. 4. The provisions of this act shall be applicable in all cases where the election was held, upon the subscription of stock and the issuance of bonds, prior to the 21st day of January, A. D. 1868.

SEC. 5. This act shall take effect and be in force from and after its publication once in *The Kansas Daily Tribune.*

Approved February 25, 1868. Published in *The Kansas Daily Tribune* February 26, 1868.

This act was framed to cure or attempt to cure defects in elections, among others where "the proposition submitted at the election was for the subscription of stock and issuance of bonds to one or more railroad companies."

This act by its terms is confined to elections had before its passage. It provides for elections "heretofore held," and by the fourth section limits that phrase to elections held on or before January 21, 1868. The election in this case, held April, 6th, 1869, cannot be helped by it.

And as the bonds recite the election and its date, they show upon their face that the authority claimed by the statute did not apply to them.

2. Neither was such authority conferred by the General Statutes of 1868, in regard to private corporations.

The legislature of Kansas in 1868 made a revision of the statute laws of that State.

The laws relating to private corporations are included in chapter 23 of the revision.

Gen. Stat. 1868, pp. 190 to 226.

By section 133,

"All acts and parts of acts inconsistent with this act are hereby repealed."

Supra, p. 226.

This act was approved Feb. 29, 1868, and took effect from its publication in the statute book of that year.

Supra, p. 226 *ad fin.*

In article vi., "Of Railway Corporations," sections 51, 52 and 53 read as follows:

"Sec. 51. The Board of County Commissioners of any County, the City Council of any City, or the trustees of any incorporated town, may take stock for such county, city or town in, or loan the credit thereof to, any railway company duly organized under this or any other law of the State; but a majority of the qualified voters of such county, city or town must, at a regular or special election to be held therein, first assent to such subscription, before it can be made.

"Sec. 52. A special election may be ordered by the County Board of any county, the City Council of any city, or the corporate authorities of any town or village, at any time, for the purpose of ascertaining the sense of the voters of such county, city, town or village, as prescribed in the preceding section. Notice shall be given of any such election at least sixty days before the holding of the same.

"Sec. 53. Upon the making of such subscription, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed by this act or by the charter of the Company; and, in order to raise funds to pay the installments which may be called for from time to time by the Board of Directors of such railway, it shall be the duty of the Board of County Commissioners, or City Council, or Board of Trustees of the town or village making the subscription, to issue their bonds, or levy a tax upon all property taxable by law to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than to pay such subscriptions. But the total amount of such tax levied for railway purposes in any one year, in any county, city, town or village shall not exceed ten per centum of the subscription made by such county, city town or village.

Gen. Stat. Kansas, 18C8, pp. 203 and 204.

This act was in force and was the only act authorizing municipal subscriptions to railways in force, on January 25th, 1869, when the order for an election in this case was made by the County Board of Johnson County.

On the 27th day of February, 1869, after the election in this case was called and before it was held, an act of the Legislature of Kansas took effect, entitled: "An act to amend sections 51, 52 and 53 of an act entitled an act concerning Private Corporations." This act is in these words:

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That section fifty-one of chapter twenty-three General Laws 1868, be and the same is hereby amended, so as to read as follows:

"SEC. 51. The Board of County Commissioners of any county, the City Council of any city, or the Trustees of any incorporated town may subscribe for and take stock, for such county, city or town in, or loan the credit thereof to any railway company duly organized under this or any other law of the State or Territory of Kansas, upon such conditions as may be prescribed by the aforesaid county, city or town authorities.

"*Provided, however*, That a majority of the qualified voters of such county, city or town, voting upon the question of subscribing and taking such stock, shall at a regular or special election to be held therein, first assent to such subscription and the terms and conditions prescribed as aforesaid, upon which the same shall be made; and *provided, further*, that when such assent shall have been given to such subscription as aforesaid, it shall be the duty of the said county, city or town authorities as the case may be, to make such subscription.

"SEC. 2. That section fifty-two of said chapter twenty-three be and the same is hereby amended to read as follows:

"SEC. 52. A special election may be ordered by the County Commissioners of any county, the City Council of any city, or the corporate authorities of any town, at any time, for the purpose of ascertaining the sense of the voters of such county, city or town, as contemplated in the preceding section. Notice of such election shall be given at least thirty days before the holding of the same, and the question or questions to be submitted thereat shall be set forth in such notice.

"SEC. 3. That section fifty-three of said chapter twenty-three be, and the same is hereby amended so as to read as follows:

"SEC. 53. Upon the making of such subscription, such county, city or town, shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the same liabilities imposed by this act or by the charter of the company in which such stock is taken, except as the same shall be varied and limited by the terms and conditions upon which the said subscription shall have been authorized and made. And it shall be the duty of the Board of County Commissioners, or city council, or trustees of the town making such subscription, as aforesaid, to pay for the same and the stock thereby agreed to be taken by such county, city or town, by issuing to the company entitled thereto, the bonds of such county, city or town, at par, payable at a time to be fixed, not exceeding thirty years from the date thereof, bearing interest at the rate of seven per cent. per annum, and with interest coupons attached.

"And it shall be the duty of the board of county commissioners, or city council, or town trustees, of any such county, city or town, so taking and subscribing stock in any railway company and in issuing bonds in payment thereof, as aforesaid, to annually levy, or cause to be levied, and collect, or cause to be collected, at the time and in the manner that general taxes are collected, a tax sufficient to pay the annual interest on such bonds, and create a sinking fund for their redemption, and the amount so levied and collected shall be kept apart from other funds, and appropriated to no other purpose than to pay said interest and redeem said bonds.

"SEC. 4. That sections fifty-one, fifty-two and fifty-three, of chapter twenty-three of general statutes of 1868, of which the foregoing sections are amendatory, be and the same are hereby repealed.

"SEC. 5. This act shall take effect from and after its publication once in the Daily Kansas State Record."

"This is to certify that the foregoing is a true and correct copy of the original enrolled bill, now on file in my office, and that the same was published in the Daily Kansas State Record, Feb. 27, 1869. THOS. MOONLIGHT,

"Secretary of State."

The election in this case, held April 6, 1869, and the subscription and issue of bonds cannot depend for their validity upon the law of 1868, above cited.

That law is expressly repealed by the fourth section of the law of 1869, without any saving clause as to proceedings already begun.

And the fact that an election had been ordered under that law gave no validity to proceedings had under it, after the law was repealed.

Aspinwall *vs.* Commissioners of Daviess Co., 22 How., 364.

Covington, &c., R. R. Co. *vs.* Kenton County, 12 B. Mon., 144.

3. Neither was their issue authorized by the law of 1869, above cited.

The law of 1868 being repealed, the authority to hold the election under an order made while it was in force was thereby abrogated; and no election was ever ordered by the Commissioners under the provisions of the law of 1869.

It may be held that the amendment of an act continues in force proceedings begun under the amended act, but that rule can only apply when the two acts are essentially alike as to the subject matter of the proceeding.

Here the two laws as to the subject matter of the proceeding are essentially different.

The law of 1868 left the question of subscription to the discretion of the Commissioners, both before and after the election.

Land Grant, etc., Company *vs.* Davis Co., 6 Kas., pages 256, 268.

Under the law of 1869 an affirmative vote made it the imperative duty of the Commissioners to make the subscription.

Other differences between the two laws are discussed in the argument.

4. There is no other law of Kansas from which authority to issue these bonds can be derived.

The General Corporation Law of 1868, section 133, above cited, repealed all previous laws on the subject.

II.

But conceding that proceedings under the law of 1868, which would have been valid under the law of 1869, are continued in force by the latter, yet it remains unquestionably true that the law of 1869, in force when the election was held and the alleged subscription made is the statute by which these proceedings are to be tested.

Tested by this law, we contend first, that the railway company itself never could have collected these bonds or coupons.

1. The act of 1869 provides for conditional subscriptions: for assent to these conditions by the popular vote, and for a limitation on the power to make such subscriptions, and on the rights and liabilities of the county as a subscriber when made, by the terms and conditions proposed and voted for.

By this act the conditions proposed become part of the authority conferred upon the county board to make the subscription and issue the bonds.

The question submitted to the voters of Johnson County, by the order of January 25th, 1869, was whether a subscription of stock and issue of bonds should be made upon conditions specified in the order.

Assenting to this proposal was not an assent to a subscription and issue without conditions, and if the conditions are disregarded as invalid, or not complied with if valid, the assent fails.

It is immaterial, therefore, whether the law of 1868 or of 1869 is to govern. Both provide for an assent by the voters to the subscription. No such assent was given except upon conditions.

If under the act of 1868 the conditions are invalid, then the assent being conditional is no assent at all.

If the conditions were valid under the law of 1869 then the conditions must be complied with or the authority is not conferred.

The finding shows that the conditions on which this vote was given never were complied with.

It is sufficient to refer to but one of them.

No bonds were ever to be issued unless the road was fully completed within certain points by Jan. 1st, 1871.

The road was not so completed; nor, in fact, was any part of the road completed until after the bonds were issued.

The terms prescribed by this order and vote are made conditions precedent to the issue of the bonds; and the time fixed by them is made of the essence of the authority to issue them.

The order of the Board, made May 22d, 1871, printed record page 25, shows conclusively that there never was any finding or determination of the Board that the conditions had been complied with.

It shows that the Commissioners assumed to disregard the conditions and to issue the bonds in spite of them.

2. The election held did not authorize any subscription or issue of bonds by the County Commissioners to the St. Louis, Lawrence and Denver Railroad Company.

The election was on a double proposition, embracing two distinct subscriptions, to different corporations, and the form of ballot prescribed and used was such as to leave no power to the voter to express assent to either subscription singly.

An assent to two propositions united is not an assent to either one by itself, and without such assent the Commissioners had no power to act.

The Supreme Court of Kansas on this very question holds that a separate vote must be had on each proposition to confer any authority upon the Commissioners to issue bonds, and that bonds issued on a vote of the character of the one in the case at bar are void.

Lewis *vs.* Commissioners of Bourbon Co., 12 Kas., 186, 213, 214 and 215.

That decision was made upon and is an interpretation by that court of the statute in question—the act of 1869.

See opinion supra, p. 215.

In that case the bonds were held void, though negotiated and in the hands of an innocent purchaser, for value.

We suppose this Court will follow in the construction of this statute of the State the interpretation placed on it by the State Supreme Court.

Town of Elmwood *vs.* Marcy, Supreme Court, Oct. Term, 1875, reported in 3 Cent. Law Jour., 511.

III.

The plaintiff, a purchaser for value of these bonds, without other notice of their infirmity than appears on the bonds themselves, is in no better position as to collecting them than the railway company.

Conceding for the present that the bonds are commercial paper, and that the plaintiff is a *bona fide* holder for value, we think they are not valid in his hands.

We believe there is no case in this Court which holds that the county shall be estopped merely by the issue of bonds by its officers. All the cases in which the county is held to be estopped by the action of its officers are cases where the bond upon its face showed a valid authority, and proceed on the ground that the officers competent to decide the question of the existence of the authority, had, by issuing the bonds with such recitals, decided that a valid authority existed, but the mere signing of such bonds, without showing such authority, is no affirmance that such authority exists. In this case there is no recital in the bonds showing any legal authority for their issue.

Marsh *vs.* Fulton County, 10 Wall., 676.

2. But we contend that these bonds are not commercial paper, and defendant in error could not be a bona fide holder.

(*a.*) The bonds on their face show that they were issued without authority. They purport to have been issued under authority of the law of February 25th, 1868, and pursuant to an election held April 6th, 1869. As already seen, that law did not authorize such an election, or any issue of bonds under such an election.

(*b.*) This Court has repeatedly held that paper otherwise negotiable, but which on its face shows that which should arouse suspicion and put the taker upon inquiry, cannot be so transferred as to cut off defences which would be available against the original holder.

Fowler *vs.* Brantly, 14 Peters, 318.

Goodman *vs.* Simonds, 20 How., 343, op. 365, 366.

Angle *vs.* Mutual Insurance Co. (Sup. Court, Oct. Term, 1875), reported 8 Chicago Legal News, 281.

This recital of the curative act of February 25, 1868, showing that there was something in the proceedings that needed the aid of that curative act to make them valid, and at the same time showing that such aid is unavailing, stamp on the face of the bonds circumstances of suspicion which put every taker of them upon inquiry, and when the recitals put him upon inquiry he is chargeable with notice.

Harshman *vs.* Bates Co. (Sup. Court, Oct. Term, 1875), reported 3 Cent. Law Jour., 367.

And if, as we contend, the recitals make the bonds void upon their face, they can only be cured by an application to a court of equity to reform them, and a transfer of the bonds would be no more than an assignment of the equitable right to have them corrected and recover on them as corrected

Such a right has none of the qualities of negotiability. Its transfer cannot cut off defences which would be available against the original holder of it.

IV.

There is nothing in the acts of the County, as shown by the facts found in this case, which estops the County from its defences.

Bigelow on Estoppel, page 80.

Clark *vs.* Session, 22 N. Y., 312.
Langdon *vs.* Dowd, 10 Allen, 423.
Freeman *vs.* Cooke, 2 Ex. Rep., 644.
Howard *vs.* Hudson, 2 Ellis and Black., 1.
Anderson *vs.* Lyon, 11 Allen, 349.
Wells *vs.* Truesdell, 6 Pick., 455.

1. The county is not estopped by the payment of interest.

The only interest found to have been paid is that paid to the plaintiff.

To constitute an estoppel by payment of interest the payment must have been made to a former holder, and on the faith of that payment, as evidence of the validity of the bonds, the plaintiff must have relied in making the purchase. The mere fact that plaintiff has received money on an unfounded claim is no reason why he should get more.

2. The receipt of stock certificates by the Commissioners from the railroad company constitutes no estoppel against the defence to these bonds.

The delivery of these certificates was a part of the act of making the subscription, and like the subscription the certificates are void.

It is found specially that the county has never claimed or exercised any rights as a stockholder under these certificates

3. The County is not estopped by the registration of these bonds by the State Auditor, nor are its rights in any way affected thereby.

The registration was the act of the State Auditor, on the application of the holder of the bonds, and without notice to or knowledge of the county or its officers.

It was not intended to affect the validity of the bonds, nor could the legislature, if it chose, make it affect their validity.

The act of 1872, under which these bonds were registered, provides for issuing bonds by municipalities for works of internal improvement, and the conditions on which they may be issued, and proceeds:

"SEC. 14. Within thirty days after the delivery of such bonds the holder thereof shall present the same to the auditor of state for registration, and the auditor shall, upon being satisfied that such bonds have been issued according to the provisions of this act, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued; that the signatures thereto are genuine, and that such bonds have been registered in his office according to law, for which registration and certificate, the auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

"SEC. 15. That the holder of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this state, may have the benefits of this act by having such bonds registered in the office of said auditor of state, as provided herein, for the registration of bonds [issued] by virtue hereof. It shall be the duty of the auditor of state, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same, of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds.

"SEC. 16. The auditor of state, shall, annually, on or before the fifteenth day of August, in each year, ascertain the amount of interest accrued and to accrue before the tax for the next succeeding year shall be levied and collected, (for the final redemption of the same,) upon all bonds registered in his office, and shall certify the amount thereof to the clerk of the county in which such bonds were issued, specifically setting forth the amount thus due, and whether from the county, or a particular city, or township therein: *Provided however*, That no tax shall be levied for the creation of a sinking fund until one half of the time for which the bonds were issued has expired: *And provided further*, That this shall not be construed as to prevent any county to levy a tax for a sinking fund if the board of county commissioners so desire.

"Sec. 17. The clerk of any county, upon receiving such certified statement from the auditor of state shall proceed to ascertain from the assessment roll of the county, the amount of taxable property in such county, city or township, and what per centage is required to be levied thereon to pay the said interest and to create a sinking fund in compliance with the certificate of the said auditor; and when so ascertained shall levy such per centage upon the taxable property of such county, city or township, and shall place the same upon the tax roll of the county in a separate column or columns, designating the purpose for which said taxes are levied, and the said taxes shall be collected by the county treasurer in the same manner that other taxes are collected.

"Sec. 18. The county treasurer of each county in this state shall, at the time of making his settlements with the state treasurer in each year, as may be provided by law, pay over to the state treasurer all moneys collected under and in pursuance of the provisions of this act, and shall take the state treasurer's duplicate receipt therefor, one copy of which shall be filed with the auditor of state and the other retained by such county treasurer.

'Sec. 19. Upon the receipt of such moneys by the state treasurer, he shall out of the same at once proceed to pay off the interest accrued upon such registered bonds; that said treasurer shall take up the coupons for all interest thus paid, which coupons shall be filed with and cancelled by the auditor of state, and the auditor's receipt taken therefor, and retained by said treasurer; that the moneys thus collected and remaining in the hands of the said state treasurer, after the payment of the said interest, as herein provided, except a sufficient amount to pay the accruing interest upon such bonds for the current year, shall be retained as a sinking fund for the final redemption of such bonds, and shall be, by the said state treasurer, at once invested as follows, to-wit: *First*, in redeeming the bonds of the county, city or township issuing the same; *second*, in the bonds of the State of Kansas; *third*, in the bonds of the United States: *Provided*, That the bonds thus purchased shall in all cases be purchased at the lowest market price: *Provided however*, That no tax shall be levied for the creation of a sinking fund until one-half of the time for which the bonds were issued has expired.

"SEC. 20. The state shall be deemed the custodian only of the taxes so collected, and credited to such county, city or township, and shall not be deemed in any manner liable on account of any such bond; but the tax and funds so collected, shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied, and the state treasurer shall be liable on his official bond for the faithful disbursement of all moneys so collected or received by him.

"SEC. 21. That when any registered bonds shall mature, the same shall be paid off by the state treasurer out of any money in his hands or under his control for that purpose, and when so paid the same shall be endorsed by the state treasurer, on the face thereof, in red ink, "cancelled," together with the date of such payment, and thereupon be filed with the auditor of state, who shall enter satisfaction of such bonds in the record where the same are registered."

This act provides a new method and one peculiarly advantageous to the bondholder for the collection of the tax and payment of the interest and principal of registered bonds. Obviously this is "the benefit of the act," which the holder of bonds issued before its passage is to obtain by registration.

On the foregoing points we make the following

ARGUMENT.

The act recited in the bonds evidently gave no authority to the County Board to issue them. The recital includes a slight mistake as to the title of the act. The words of the recital are, "An Act to authorize Counties and Cities to issue Bonds to Railroad Companies," approved February 25, 1868. The title is: "An Act to authorize Counties to issue Bonds to Railroad Companies," and is approved February 25th, 1868.

This is the only act containing in the title the words "an act to authorize," and the words "for railroad purposes," on the Statute Book of 1868, and the only act on the subject approved February 25, 1868, and is obviously the act referred to in the bonds; and the slight error in the recital could mislead no one.

This law is plainly a curative act, intended to cure defects in votes theretofore taken, and by the fourth section of the act its effect is expressly limited to cases where the vote had been taken prior to the 21st day of January, 1868, and as the vote for the issuance of the bonds in suit was not taken, as appears by the bonds themselves and by the finding of the Court, till April, 1869, it is quite clear that the act recited gave no authority for their issue. The defendant in error must, therefore seek elsewhere for statutory authority for such issue.

The law found in the General Statutes of Kansas, page 203 *et seq*, set forth *ante* p. 8, can give no authority for issuing these bonds because it was repealed by the law of Feb. 27, 1869, cited, *ante* p. 10, and another and different law substituted in its place.

The order for election was made while the general corporation law of 1868 was in force; the election, subscription and issue of bonds after its repeal.

It will hardly be contended that the fact that the election was called under the former law vested any right in the county or the railroad company to have the election held, the subscription made or the bonds issued after its repeal.

The case of Aspinwall *vs.* Joe Daviess County in this Court settles the principle, that no election voting bonds, (certainly not a mere order calling an election) vests any right in a County or Railway Company that cannot be taken away by a repeal of the law.

By the General Statutes of 1868 all laws on the subject, prior to the General Statutes, are expressly repealed by section 133 of the act concerning private corporations, cited *ante* p. 8.

It follows, therefore, that if there was any statutory authority for subscribing the stock and issuing the bonds in this case it must be found under the act of February 27th, 1869.

That act was in force when the vote was cast, the subscription made and the bonds issued and might have authorized the issue had its provisions been followed, but they were not.

Section 1 of that act provides that the Board of County Commissioners of any County may subscribe for and take stock for such County, or loan the credit thereof to any Railway Company duly organized under this or any law of the State or Territory of Kansas, upon such conditions as may be prescribed by the aforesaid County authorities, provided that a majority of the qualified voters of such County shall first assent to such subscription and the terms and conditions prescribed as aforesaid, and provided further, that when such assent shall have been given, it shall be the duty of the said County authorities to make such subscription. See *ante* p. 10.

Section 2 provides for calling an election for the purpose of ascertaining the sense of the voters as contemplated in the preceding section.

No election was called by the Board of County Commissioners, pursuant to this law, and therefore the voters never cast any vote pursuant to the law. The Board had, before this law was enacted and the former law repealed, submitted to the voters a so-called proposition to take stock in and issue bonds to the St. Louis, Lawrence and Denver Railroad Company, as set forth in the finding of fact, upon which the voters voted in the affirmative after the law of 1869 was in force. But by the repeal of the law under which the submission was made without any saving clause, the proceeding of the County Board in submitting the question was abrogated, consequently the vote of the people was an unauthorized proceeding, not based on the action of the County Board.

We concede that, under the statute of Kansas, proceedings under a law repealed by an amending act would not be abrogated by the repeal, if as to the subject matter of the proceeding, the substituted law was in substance the same as the repealed law, but we say that in this case the law repealed and the law substituted differ as to the subject matter in question in essential particulars.

By the law of 1868 the County Commissioners were authorized to subscribe stock, but a majority of the qualified voters of the county must, at an election, etc., first assent to such subscription. A submission to the voters, under the law of 1868 asks the assent of the people that the County Board may exercise its discretion in relation to subscribing stock, and so the Supreme Court of Kansas has interpreted the similar preceding law of 1866. See Land Grant Railway and Trust Company *vs.* Davis County, 6 Kas., 256; opinion page 268.

But the submission to the people, under the law of 1869, asks for the absolute command of the voters to subscribe or not to subscribe the stock, upon the terms and conditions mentioned in the order of submission, it being by that law made *the duty* of the Board to make the subscription if the voters so decide.

Again, by the former law, section 53, when such subscription was made the Board was authorized to pay for the same by issuing bonds or by levying a tax, while by the law of

1869 the Board was required to pay for the stock by issuing bonds to the railroad company, at par.

By the same section, under the first law, the county when the subscription was made, became a stockholder in the railroad company, with the same rights and liabilities as all other stockholders; by the corresponding section of the amended law it becomes only a stockholder upon conditions, and its rights and liabilities are limited by the terms and conditions prescribed in the vote.

In both these enactments the Legislature sought to secure the public interest by dividing the power between the municipal authorities and the voters. The first left the whole power in the County Board, except that it required the Board to get the assent of the voters that stock of the Railroad Company might be subscribed by the County Board or not in its discretion, and when it did, the County should become an absolute stockholder in the company, and the Board might pay the subscription by issuing bonds or levying a tax. The second law authorized the Board, at its discretion, to submit the proposition to subscribe to the voters on such terms and conditions as it thought proper, but there its power ended; there was nothing more for it to do but to execute the will of the voters and, if they so directed, to subscribe the stock and issue the bonds on the conditions prescribed, and the County then became a stockholder, subject to those conditions.

Now, if the vote proposed by the County Board under the first law, and voted under the second is treated as valid the power sought to be conferred on the Board by each law has been lost by the change in the law. The discretion reserved to it when it ordered the vote is swept away by the change in the law, and the Board, not having, under the new law, submitted any proposition to the voters, it has never exercised the discretion given it by that law; it has never expressed its willingness to subscribe stock nor the terms and conditions on which it was willing to subscribe under that law.

It seems to us clear that this proceeding is not an exception to the general rule, that proceedings pending under a statute are abrogated by the repeal of the statute, and, therefore, the vote is void, and the subscription having been made and the bonds issued without authority, are void.

But conceding that the effect of the passage of the amended law, in 1869, was to continue in force, all proceedings under the former which were consistent with the subsequent law, and this is the utmost that can be claimed for it, and we find that the provisions of the law of 1869, in force when the election was held, the subscription made and the bonds issued are the authority upon which the election, subscription and issue must depend, and by which their validity must be tested.

Tested by this law it is very clear that the railway company itself could never collect these bonds or coupons.

(1.) This statute provides that the county authorities may prescribe conditions on which the subscription is to be made, and that these conditions must receive the assent of the voters, and that the rights and liability of the county, as a stockholder, are modified and limited by these conditions.

And, as we have already seen, the vote, under this law, is the final determination of the question of the subscription, and of the conditions on which it is to be made. The act of the Commissioners in subscribing is merely executive. If the vote is favorable it is made their duty to subscribe, and that subscription is "limited by the terms and conditions upon which the said subscription shall have been authorized and made."

Under this law the vote became more than a mere condition precedent. It is the authority on which the Commissioners not only may but must act, and the conditions voted are limitations of that authority, which they cannot exceed, and are by the act incorporated into and become a part of the subscription itself.

In the present case the prescribed conditions were clear and imperative, and beyond doubt an essential part of the proposed subscription.

No bonds were to be issued until the road was completed from Lawrence to Olathe; "nor shall any of said bonds ever be issued," is the language used, unless the road was "fully graded, bridged, tied, ironed and ready to be operated" that distance by January 1st, 1871; if completed so far, in that time, the second half of the bonds should not be issued until the road was completed across the county; nor should any of the second $50,000 ever be issued unless it was so completed by April 1st, 1871.

The time thus fixed is made of the essence of the authority to issue the bonds, and of the company's right to receive them under the proposed subscription. The voters not only do not authorize, but expressly forbid the issue of bonds on any other terms.

It is scarcely necessary to argue that these conditions could not be waived by the Board of County Commissioners, as the law made the assent of the voters to the conditions the authority by which alone the Commissioners could act. Unless the conditions were to be complied with the assent of the voters, which was given only upon these conditions, was never obtained at all.

Whether, under the law of 1868, the Board had the power to submit to the voters the question of subscription, with conditions, may be doubted; but if they had not, the vote would be void under that law, because a vote to take stock and issue bonds, if the road was completed in a certain time, certainly could not be a vote to take stock and issue bonds without such completion.

The findings of the court show that these conditions never were complied with, that there is not only no finding of the County Board that they were complied with, but that its records show that there never was any pretence of such compliance.

In December, 1870, eight days before the first half of the road was to have been built, or the subscription would fall and "no bonds could ever be issued," and when no part of the road was built, the Commissioners make an order attempting to extend the time for the completion of the road to October 1st, 1871, and sent the bonds, ready signed and sealed, out of the State to be deposited in *escrow*—a not unusual device to put municipal bonds beyond the reach of the process of the State Courts, and pave the way for fraud in their delivery.

In the following May, when, by the conditions, the road was to have been completed across the County, though as yet no part of it had been completed in the County, the Commissioners ordered the bonds to be delivered to the Railway Company, on the certificate of its engineer that the grading and masonry were completed, and they were so delivered before any part of the road was completed.

The road not having been completed from Lawrence to Olathe by the first day of January, 1871, the right of the Commissioners to subscribe stock and issue bonds had not been acquired, and by the express terms of the vote any such action was forbidden.

That the Commissioners exceeded their authority, that the delivery of the bonds by them, and that their receipt by the Railroad Company was a fraud upon the County is too plain for argument.

We contend, therefore, that as the vote is the final determination of the question of subscribing stock and issuing bonds under this law, and hence the authority upon which the subscription and issue depend, as the conditions contained in the vote are made a part of it by the law, and consequently limitations upon the authority which the vote confers, as the conditions contained in this vote are by their terms made an essential part of the power to subscribe, and as they were flagrantly and fraudulently violated, the subscription, as between the county and the railroad company, was a nullity, and the bonds while in the hands of the railroad company could not be collected.

2. The election called and held in this case was not in compliance with the laws in another respect.

The proposition submitted to and voted on by the voters, was to take stock in two different Railroad Companies, and on different conditions as to each, and they were so submitted as to compel the voter to vote for both or neither. The form of ballot prescribed, "for or against subscription and bonds to the Railroads," prevented the voters from expressing an opinion on the proposed subscription to the St. Louis, Lawrence and Denver R. R. Co., as a distinct proposition.

That proposition, therefore, has never received the assent of the voters which the law required.

We forbear to characterize this proceeding as we think it deserves.

The Supreme Court of Kansas has done that for us in the case of Lewis *vs.* Commissioners of Bourbon County, 12 Kas., 186, at pages 213, 214 and 215, of the opinion, holding that a double proposition, like the one in this case, was a fraud on the community to which it was submitted; that an election on such a proposition was not a compliance with the law and conferred no power on the municipal officers to make the subscription, and that bonds issued under it were void, even in the hands of a bona fide holder. We commend the opinion in that case, on that point, to the consideration of this court, especially because this opinion is an interpretation of the law of 1869, in force when the election in this case was held; it is the first and only construction of that law in that court, and as such this court, as it has always held, and in the recent case of Town of Elmwood *vs.* Marcy has reiterated, is bound by that construction.

For the reason then that the proposition voted was not such a proposition as the law required, and because the voters of Johnson County have never assented to a subscription to the stock of the St. Louis, Lawrence and Denver Railroad Company, that company could never collect the bonds or coupons issued on such a subscription.

This brings us to the question whether the plaintiff below holding these bonds for value, and without notice of these defects, "other than what appears on the bonds themselves," and such as he is charged with by law, stands in any better position.

And first we contend that there is no case in this or any other Court which holds that bonds issued by municipal officers without authority from the municipality or not in accordance with the provisions of the law authorizing such issue, are valid in the hands even of a *bona fide* holder for value, unless the bonds recite or show on their face a legal authority for their issue.

The mere fact that negotiable bonds were issued by the agents of a municipality without any statement of their authority to do so on the bonds themselves, raises no such presumption that they were lawfully issued as to conclude the municipality when sued by a *bona fiide* purchaser.

It is true that in the opinion in the case of Knox County *vs.* Aspinwall, language is used by Mr. Justice Nelson which might lead to such a result, but the decision proceeds on the ground of recitals in the bonds themselves and these intimations of that learned Judge are inconsistent with the subsequent course of the decisions in this court, which hold that it is the recitals in the bonds showing a valid authority for issuing them, which estops the County from denying the regularity of their issue, after they have been negotiated.

The signature by the officers of the County to a bond is no affirmation that the officers possessed the power to issue it unless the bond shows upon its face that it is issued pursuant to authority of law.

But if the bond does show upon its face the authority by which it is issued and that authority is good, there is an affirmance of such officers that the bond is lawfully issued, and upon that affirmance, as we think, all the authorities holding the municipality to be estopped, by the act of the officer in issuing the bonds, rest.

If the mere fact that bonds have been issued is conclusive as to their validity when in the hands of an innocent holder, then in every instance where the plaintiff can find any law authorizing the issue of any negotiable bonds under any circumstances, and can produce a bond which he has purchased for value, he must recover, without any regard to the purposes for which the bond is isued. But this is wholly incompatible with the numerous cases decided in this Court, like that in Marsh *vs.* Fulton County, 10 Wall. 676, where even *bona fide* holders were defeated, there being no recitals in the bonds by which the County was estopped.

As we have already seen, the law recited in the bonds in suit confers no authority for their issue under the election also recited in them. The recitals, therefore, do not help the bonds and do not estop the County by showing an authority for their issue that might be valid and regular.

The recitals in these bonds so far from helping the position of the plaintiff below, render it impossible that the bonds could be commercial paper or that he could be an innocent holder within the law merchant.

The act recited in the bonds, as already shown, was intended to cure defective elections, especially elections in which one of the same defects occurred which existed here, the two propositions submitted to one vote. The elections it undertakes to cure were such as were held before January 21st, 1868, and it had no application to the election recited in these bonds.

If the recitals in these bonds are true, and the plaintiff claims under them in his declaration, then the bonds are absolutely void, the law under which they were issued confering no such authority as is attempted to be exercised, and not only are they void, but that fact appears on their face, and from the statements they contain.

We take it to be true that an instrument to be entitled to the privileges of commercial paper must purport on its face to be a valid agreement of the persons sought to be charged with its payment, but these bonds, as already shown, are void, if the statements they contain are true.

If the plaintiff below had proved the execution of the bonds by the County Commissioners in due form, and their and the language of the recital in the bonds, that "this bond is executed and issued by virtue of and in accordance with the act of the Legislature of the State of Kansas, entitled, 'An act to authorize counties and cities to issue bonds to railroad companies, approved February 25th, 1868,' and in pursuance of and in accordance with the vote of a majority of the qualified electors of the County of Johnson, at a regular election, held on the 6th day of April, 1869," admits of no other meaning, except that the law cited and the vote referred to are the only law and vote by authority of which the bonds were issued. The language is in its character exclusive.

A statement for the information of the purchaser that the bond is issued by such authority implies that no other authority is claimed, and a search of the county records would have shown that none other could justly be claimed.

official character, and rested, the defendant would have been entitled to a nonsuit or a verdict upon demurrer to evidence, because it would have affirmatively appeared by the bond that it had been issued without authority of law. Evidence *aliunde* would have been necessary to prove that the bonds were issued in payment of a subscription for railroad stock or for some other consideration for which the Board of County Commissioners had power to issue bonds and that would contradict the recital in the bonds, and, therefore, would have been inadmisssible.

Of course no one can be a *bona fide* holder of paper void on its face.

If the defendant in error contends that this recital is false or made by mistake, his position as a holder of the bonds in question is not aided.

The rule has been laid down in this Court by a series of decisions, that where paper, otherwise negotiable as commercial paper, contained on its face anything which gives rise to suspicion as to its validity or as to the title of the one offering it for sale, it cannot be transferred so as to cut off defenses against it.

In the early case of Fowler *vs.* Brantly, 14 Pet. 318, this rule was applied to an ordinary promissory note, negotiable in form, but made in a form ordinarily used for discount, at the bank at which it was intended by the maker to be discounted and with a number on it in pencil figures which was shown to be the peculiar way in which the bank marked paper offered for discount and rejected. The plaintiff had taken the paper for value and without actual notice.

But the Court held that the form of the note and the pencil number marked on it were enough on the face of the paper to put the taker on inquiry, and as that inquiry would have led him to the fact that the paper had been made for discount at that bank only, had been offered there and rejected, he must be held to have notice of those facts.

The principle is reaffirmed in the case of Goodman *vs.* Si-

It is not easy to see how the receipt of these certificates operated as a representation to the plaintiff, and there is certainly no finding, evidence or presumption that the Commissioners received these certificates for the purpose of inducing the plaintiff to purchase the bonds, or that he was induced to purchase the bonds in consequence of their having taken the certificates.

The mere delivery of these certificates at the time the bonds were issued, was a part of a void transaction—the subscription was void, and the certificates, as a part of the subscription, also void, and the County is estopped by the one no more than by the other.

The County itself has never received these certificates. They were taken by the Commissioners without authority and as part of a transaction which they had no authority to make.

If the County had, through its officers or otherwise, claimed to be a stockholder in the Railroad Company, and acted as such, if the plaintiff had known that fact and relied upon it in purchasing the bonds, and the face of the bonds such that they were commercial paper and might be purchased *bona fide*, there might have been some plausibility (and we think mere plausibility) in the suggestion that the County had estopped itself from denying the validity of the bonds and in the claim that it could not, while exercising the rights of a stockholder, at the same time refuse to pay for its stock; but it is found specially that it "never has received any dividends or anything on account of these certificates, that it has never interfered in the management of the road, nor claimed, received or exercised any of the rights, powers or advantages of a stockholder." (Special finding No. 11, printed record, p. 26).

The certificates were void, and the County has always so held them.

The certificates were mere false evidence in the hands of the County Commissioners that the County owned stock which it never owned—not having authorized the Commissioners to take it—never received any advantage from and never claimed to own.

The defendant in error persistently claimed in the court below that the county was estopped, or in some way cut off from its defences, by the fact that these bonds had been registered in the office of the auditor of state, under the law of 1872, providing for the registration of bonds, and it therefore becomes proper to advert to that point here.

That act confers authority upon municipalities to issue bonds for works of internal improvement, and prescribes the mode and conditions upon which they may be thereafter issued. It provides for the registration of such bonds with the auditor of state, and prescribes the certificate he shall make upon such registration. It provides for the mode in which the interest and principal of registered bonds shall be collected and paid, by a certificate of the amount to be collected from the auditor to the county clerk, by a levy of a tax by the county clerk, by the collection of the tax by the county treasurer and payment by him to the state treasurer, who is to pay the money to the holders of the bonds and coupons.

This mode of assessing and collecting the tax was devised to facilitate the payment of the interest on the bonds, and of the bonds as they became due, and the fifteenth section of the act provides that the holder of bonds before issued (as the bonds in suit were) may have the benefits of the act by having his bonds registered. Obviously the benefit intended thus to be conferred was the right to have the tax collected and payments made in the mode prescribed by the act.

It is not probable that the legislature by this act intended to or did constitute the state auditor, who is an executive officer, the sole judge to pass upon the validity of all the bonds previously issued in the state, on the application of the holder, without notice to the county, without hearing the county, without evidence and without appeal, and it is reasonably certain that if they had undertaken to do so their act would have been unconstitutional; and the only reasonable construction which can be given to the section of the act referred to is the one we have suggested; that by registration the holder might, if he chose, avail himself of the proposed method of having his interest collected and paid.

We think it apparent that from the facts, found in the court below, the plaintiff in that court was not entitled to recover, and ask the reversal of the judgment.

NELSON COBB,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

(No. 874.)

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON, Plaintiff in Error,

vs.

DERRICK A. JANUARY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Kansas.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JAMES GRANT AND L. M. FISHER.

FACTS AS SHOWN BY THE RECORD.

This suit was brought upon coupons off of bonds issued by the county of Johnson, Kansas. Judgment was rendered in favor of the plaintiff, in the Circuit Court, by Justice Miller. (Record, page 26.)

The bonds recited that they were "executed and issued by virtue of and in accordance with the act of the Legislature of the State of Kansas, entitled, an act to authorize counties and cities to issue bonds to railroad companies, approved February 25th, 1868, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the county of Johnson, at a regular election, held on the sixth (6th) day of April, 1869." (Record, pages 13 and 26.)

The court found, from the county records, that a proposition to subscribe one hundred thousand dollars to the capital stock of the St. Louis, Lawrence and Denver City Railroad Company, upon certain named conditions, was submitted, by the Board of County Commissioners, to the voters of Johnson county, at a regular election held on the 6th of April, 1869, and that the proposition was assented to by a large majority of the voters. (Record, pages 21 and 22.)

There were four conditions named in the proposition. (Record, page 21.)

1st. That no part of the bonds should be issued until the company's railroad was ready to be operated from Lawrence, via DeSoto to Olathe, Kansas.

2d. No part of the bonds should be issued to the company unless the above named portion of the railroad should be ready to be operated by the first day of January, 1871.

3d. That no more than fifty thousand dollars of bonds should be issued until the railroad should be ready to be operated from Olathe to the east line of Johnson county.

4th. That the second fifty thousand dollars of bonds should not be issued unless the last named portion of railroad was completed by the first of April, 1871.

This proposition for subscription to the St. Louis, Lawrence and Denver City Railroad Company, was united with one to subscribe, under certain named conditions, to the stock of lhe Kansas City and Sante Fe Railroad Company. (Record, page 21.)

The Board of County Commissioners finding that the railroad company, on account of unavoidable circumstances, had been unable to complete the railroad as required by the proposition submitted to the voters of Johnson county, extended the time within which the railroad should be completed, to October 1st, 1871, and ordered the bonds to be deposited with the Second National Bank of St. Louis, to be delivered on completion of road by that date. (Record, pages 24 and 25.)

The board afterwards authorized the delivery of the first $50,000 of bonds when the masonry and grading of the St. Louis, Lawrence and Denver Railroad had been completed from the eastern boundery of Johnson county to Olathe, and the issue of the second $50,000 of bonds when the masonry and grading of the railroad were completed from Olathe to the western boundary of the county of Johnson. (Record, pages 25 and 26.)

And the bonds were delivered to the railroad company before the railroad was ready for operation, but after the grading and masonry were completed as required by the last named order of the county board, (Record, page 26.)

The railroad was not completed and ready for operation from Lawrence to Olathe by the 1st of January, 1871, nor was any part of the railroad ready for operation on the 1st day of April, 137I. (Record, same page.)

The court further found that the railroad was, after the delivery of the bonds, completed and had been in operation ever since completion. (Record, page 26.)

That the defendant had paid prior installments of interest on these bonds to plaintiff. (Record, page 26.)

That the plaintiff held the bonds and coupons in suit as a *bona fide* holder for value before said bonds and coupons were due and without notice of any defect in the proceedings upon which the bonds were issued, other than what appears on the face of the bonds and coupons. (Record, page 26.)

That the county had received certificates for 100,000 dollars of stock in the St. Louis, Lawrence and Denver City Railroad Company, and still retained the same. (Record, page 26.)

These bonds had, moreover, been duly registered with the Auditor of State of Kansas, under an act of the legislature, entitled "an act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvements, and providing for the registration of such bonds and the repealing of all laws in conflict therewith, approved March 21, 1873." Each of these bonds bore the certificate of the Auditor of State that it had been regularly and legally issued, that the signatures thereto were genuine, and that it had been registered in accordance with the provisions of the above named act. (Record, pages 15 and 16.)

And the fact of registration is admitted by the pleadings. (See amendment to petition of plaintiff, record, page 15.)

ARGUMENT.

The act of February 25th, 1868, recited in the bonds was a curative act and authorized the issue of bonds where an election had been held previous to 21st of January, 1868, and a majority of the electors had voted for such issue, whether the elections had been ordered or held in compliance with the statute or not, " or whether the proposition submitted and election had, was for the subscription of stock and the issuance of bonds to one or more railroad companies."

General Statutes of Kansas, 1868, page 892.

The foundation of the argument against the validity of these bonds, is that their recital that they were issued by virtue of and in accordance with the act of Feb. 25, 1868 is untrue, because the bond also recites an election of April 6, 1869 :

To put this argument more strongly, it assumes, that because the bond recites the election, subsequent to the act of Feb. 25, 1868, therefore there could not have been an election prior to the passage of the act of Feb. 25, 1868. And this argument derives its chief force from the facts now disclosed, showing, that there was only one election.

This is not the interpretation put on such recitals by this court. The *bona fide* holder is not bound to or presumed to look at the records. He is authorized to assume that the recitals are true, whether shown so to be, by the record or not. If there was no other recital, except that the bonds were issued by virtue of and in accordance with the provisons of the act of Feb. 25, 1868, the *bona fide* holder could rest assured that such a recital was conclusive proof to him, that an election had been held prior to the passage of that act.

That act, (see general statutes of 1868,) page 892, authorizes the county officers to issue bonds voted prior to its passage "whether in compliance with the statutes in such case made and provided or not."

But say the other side, the bond also recites, that it was "issued in pursuance of and in accordance with an election held on April 6, 1869," and therefore says the counsel, it proves, that no prior election was held. How so : does an affirmative recital prove that a prior affirmative recital is false. Both may be true; the *bona fide* holder has a right to assume, that both are true.

He certainly has a right to assume that recital to be true, which sustaines the validity of the bond and it turns out on examination of the statutes in both cases, that if either was true the bond was valid.

The Supreme Court of Kansas in Morris *vs.* the county of Morris, 7 Kansas, pages 588, 589, 590, 591, in commenting on this act of Feb. 25, 1868, say, that two elections may be held under it, one before the passage, and one afterwards amendatory of the previous election:

"The second election was amendatory and supplemental to the first election and changed the conditions of the first", page 590. "We think the second election was valid as "a supplementary and amendatory election"—page 591.

So that we have not only the authority of this court as to the conclusivness of the first recital, but that of the Supreme Court of Kansas, that the second election, referred to in the bond was valid as supplemental to the first and not contradictory of it.

II.

Plaintiff further contends that there was no law whatever authorizing the issue of these bonds.

Now even were the recital of the law in the bonds not conclusive there was complete legal authority for their issue.

This issue was authorized by an act, entitled "an act," to amend sections 51, 52 and 53 of an act " entitled an act concerning private corporations. (Laws of Kansas, 1869, page 108.) This amendment provides that each amended section "shall read as follows", and then incorporates together the new matter and the old. Section 51 as amended declares, that "the Board of County Commissioners of any County, * ** may subscribe for and take stock for such County, * * * in or loan the credit thereof to any railway company duly organized under this or any other law of the State of Kansas upon such conditions as may be prescribed by the aforesaid County *** authorities provided however, that a majority of the qualified voters of such County, * * * voting upon the question of subscribing and taking such stock, shall at a regular or special election to be held therein first assent to such subscription prescribed as aforesaid, and the terms and conditions upon which the same shall be made; and provided further that, when such assent shall have been given to such subscription as aforesaid, it shall be the duty of the said County *** authorities as the case may be to make such subscription.

Section 52, as amended, merely provided for a special election and is not material in this controversy.

Section 53, as amended provides, that the county may upon making such subscription become like other subscribers to such stock entitled to all the rights and privileges of other stockholders, and authorizes the Board of County Commissioners to issue the bonds of the county in payment at par for the stock subscribed and taken. This law further provides for the repeal of the original sections above named and was intended as a substitute for the same. It went into effect on the 27th day of February 1869.

The resolution for the submission of the question of subscription to a vote of the electors was passed by the County Board on the 25th of January before the passage of the last named act, and the election was held on the 6th day of April following.

The opposing counsel admits, that the act of Feb. 27, 1869, authorized the issue of these bonds, had its provisions been followed : They object, that there was no technical compliance, because the order for the election was begun under the general law of 1868, repealed by the law of Feb. 27, 1869.

To this objection there are two answers :

1. The notice and other measures preliminary to the vote begun under the general laws of 1868, being continious, were good under the act of Feb. 27th, 1869, because there was no differance in these respects between the general statutes of 1868 and the amendment of Feb. 27th, 1869. The principle of construction declared in the General Statutes of Kansas (page 1128, sec. 8), applies, that "the provisions of the general statutes, so far as they are the same as prior laws, shall be construed as a continuation of such laws and not as new enactments."

2. The bonds recite, that they were issued, "and in pursu-"ance of and in accordance with the vote of a majority of the "qualified electors of the County of Johnson at a regular elec-"tion held on April 6th, 1869."

Now, we do not perceive, how the adverse argument escapes the effect of this recital, which sets out not only that there *was* a vote of the people, but that the bonds were issued *in pursuance of and in accordance with* the vote: Now, if the vote required any conditions, many or few, the recital says, the bonds were issued in compliance therewith.

How does the plaintiff get around this recital? only by saying it is not true, which he cannot aver against a *bona fide* holder.

The General Statutes of Kansas, 1868, Art. 6, Sec. 51, 52 and 53, (sections amended by act of Feb. 27th, 1869), give the most ample power to the county commissioners to subscribe to the stock of railway companies and to issue bonds in payment of the same, provided the subscription was assented to by a majority vote of the electors.

They do not require, that the terms and conditions of the subscription should be assented to by the electors.

It was not necessary for the county board in its proceedings prior to Feb. 27th, 1869, the date on which statutes of 1869 went into effect to comply with that statute.

All the prior proceedings were governed by the general statutes of 1868, "Where an amendment of a statute is made by declaring: it shall be amended so as to read in a given way, the amendment has no retractive force." "The new provision is to be understood as taking effect at the time the amended act would otherwise become a law."

Note to Potters Dwarris on statutes, page 165, citing,
Ely vs. Halsted, 15, New York, 595.

There is however no claim upon the part of the county but what the provisions of the act of Feb. 27th, 1869, were complied with prior to and including the vote.

The record shows, that the proposition submitted by the county board did contain the terms and conditions upon which the subscription was to be made and that these terms and conditions were duly assented to by the electors at a regular election. (Record, pages 21 and 22.)

It is for the failure to comply with those terms and conditions after the election had been held, that these bonds are claimed to be void.

Even if true that the bond recites the wrong law, the purchaser had only to examine the Statute of Kansas, to find the law of 1869, fully authorizing the issue of the bonds by the county commissioners, and they are made by law the canvassers of the votes and the judges of the fact, whether the bonds are issued in accordance with the vote of the electors. And the bonds contain their recital, that they do so comply and the purchaser was not bound to look further.

III.

The defendant relies a *dictum* in the case of Lewis *vs*. Commissioners of Bourbon County, (12, Kansas, page 186) to the effect, that two questions cannot be submitted to a single vote. There is a material difference between that case and the one at bar.

The bonds in that case (12th Kansas) contained no recital that they were issued in accordance with a vote of the electors, nor any recital whatever. There was also no evidence of the ratification by the county of the acts of its officers by the acceptance of the stock and payment of interest. The question decided is a matter of general law and does not arise out of any particular provision or language of the Kansas Statute. And this court is not bound by its decision.

Butz vs. Muscatine, 8 Wall , 575.
Olcott vs. The Supervisors, 16 Wall., 678.
Pine Grove vs. Talcott, 19 Wall., 666.

The Kansas court in this case cite as their authority the decisions of McMillan vs. Lee County, 3 Iowa, page 11, and especially, The People, *ex rel*, vs. Tazewell Co., 22 Ill., page 147, and Clarke vs. Supervisors of Hancock County, 27 Illinois, 305.

In all these cases, except the one last cited, the question arose on either an injunction to prevent or a mandamus to compel the issue of the bonds. The bonds had not been issued and the rights of *bona fide* purchasers were not involved.

The Lee County bonds were after the above decision validated by the Iowa Legislature. And the Supreme Court held the curative act constitutional, as the dual vote vote was merely an irregularity. Most certainly if the bonds were void no act of the legislature could cure them. If merely voidable they are valid in the hands of *bonafide* purchasers.

In the case of (Clarke vs. Supervisors of Hancock County, 27 Ill., 305, the last case decided by the Illinois Supreme Court) the bonds had been issued and passed into the hands of *bona fide* holders, and the court held the bonds valid notwithstanding the dual vote.

" In this case, (say the court) the election was in all things, except the submission of the proposition to take stock to the gross amount in two roads, strictly legal." " We have no hesitation in saying that it was such a deviation from the correct mode as may be rendered valid by subsequent acts so as to protect the rights of third parties which may have been subsequently acquired."

" The people acquiesced in the election, the Board of Supervisors issued and delivered the bonds, and afterwards paid some installments of interest.

" Had the proceedings been instituted by any citizen of the county to restrain the issue of the bonds the relief would have been granted. But when they have issued and have passed into the hands of *bona fide* holders, good faith, justice, and every principle of fairness, require that they should not be held invalid for any but the most weighty reasons."

Clarke vs. Supervisors of Hancock Co., 27 Ill., 305.

The Kansas decision directly conflicts with the numerous decisions of this court, that irregularities in the exercise of a power to subscribe to the stock of railroad companies and to issue bonds will not vitiate the bonds in the hands of *bona fide* purchasers.

Knox vs. Aspinwall, 21 Howard, 39.
Grand Chute vs. Winnegar, 15 Wall., 356.
Lexington vs. Butler, 14 Wall., 282.
Mercer Co., vs. Hacket, 1 Wall., 83.

And the U. S. Circuit Court for Kansas has refused, in an action on the same class of bonds, brought by a plaintiff of the same name, against the same defendant to follow that decision as it is not a decision on the construction of State statute, but upon a matter of general law, and is clearly contrary to the adjudications of this court.

IV.

If the bonds do recite the wrong law the purchaser had then only to examine the Kansas statutes to find a law giving complete authority for the issue of bonds. He is bound to take notice of the law whether recited in the bond or not. If there was a false recital of the law the plaintiff could claim no benefit from that because he must take notice of the law. He stands in no worse or better position by reason of a false recital so long as there is a law authorizing the issue of the bonds.

It is the fact of non compliance with the law of which he need take no notice. Not only reason but authority sustains the position that plaintiff's false recital can not prejudice its bonds in the hands of *bona fide* holders.

" But it is objected in this case that the bonds in controversy on their face purported to have been issued under the act of 1855 and that the holder is estopped from claiming that they were issued under the special act of 1857, which was the charter of the company."

"Whether the recital in the bonds would constitute an estoppel against the makers, it is not important to inquire; if it were so, it would not follow that the purchaser or holder is bound. If he can show that the power existed, a false recital of it, however obligatory on the county or its agents, would not defeat its efficacy in the hands of a party no wise concerned in the perpetration of the falsehood."

Smith vs. Clarke Co., 54 Mo., p. 58.

V.

The most that plaintiff can claim is that the recital is a nullity, and affects neither party. We are entitled to recover without any recital of the law whatever, even though the vote was dual and though the terms and conditions assented to by the electors were not followed. In Meyer vs. Muscatine, 1 Wall., 388. The bonds contained no recital of the law, yet the Court held "if that legal authority—were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it, had complied with its requirements."

In the case of Pendleton Co. vs. Amy, 13 Wall. page 297, where the bonds contained no recital whatever, and where the law under which the bonds were issued contained a proviso that the real estate owners should so vote by a majority, and the question of subscribing stock had never been submitted to the real estate owners of the county, this court held the bonds valid and said: "A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be *coupled with conditions precedent*. If the right to subscribe be made dependent upon a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was." "When, therefore, they make a subscription and issue county bonds in payment, it may be presumed, in favor of an innocent purchaser of the bonds, that the conditions which the law attached to the exercise of the power has been fulfilled."

VI.

But the bonds recite that they were issued in purchase of and in accordance with a vote of the majority of the qualified electors of the county of Johnson, at a regular election held on the 6th day of April, 1869. There are separate and distinct recitals of the act of 1868 and also of the vote connected by the word "and." The Board of County Commissioners are empowered by the act authorizing issue of the bonds of Feb. 27, 1869, to take stock for the county upon such terms and conditions as the Board may prescribe, provided a majority of the qualified voters of the county at a regular or special election, assent thereto. Upon such authority it is made their imperative duty to make the subscription and the issue of bonds. They canvass the vote and are the only tribunal established by the law to determine when the conditions precedent have been complied with. By the above recital they have made their decision and declaration of the same to the world.

In Linde vs. the County, 16 Wall., 6, this court held the recital in the bonds that all of said bonds are issued in accordance with a vote of the people of said county, and that "the people have voted the levying sufficient taxes, etc.," is conclusive evidence against the county of the popular sanction so far as respects holders *bona fide* and for value.

This court in the above case say, "The county judge is the officer designated by the statute to decide, whether the voters have given the required sanction." "He executed and issued the bonds and the requisite popular sanction is set forth on their face: "It is a settled rule of law, that where a particular functionary is clothed with the duty of deciding such a question his decision is final." It is not open for examination and neither party can go behind it." "Here bonds are in the hands of a *bona fide* purchaser, and under the circumstances, was he not bound to look beyond the avrement on their face."

It has also been declared by this court, "such a power (to issue bonds) is frequently conferred to be exercised in a special manner or subject to certain regulations, conditions or qualifications, but if it appears, that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect, will not constitute a defence to the corporation in a suit on the bonds or coupons, if it appears it was the sole province of the municipal officers who executed the bonds to decide, whether or not there had been an antecedent compliance with the regulation, condition or qualification which was not fulfilled."

St. Joseph Township vs. Rogers, 16, Wall , 644.
Knox vs. Aspinwall, 21, Howard, 544.

These decisions were lately re-affirmed in Town of Coloma *vs.* Eaves (October term A. D. 1875, 3, Central Law Journal, page 325.) In this case the law provides, that no subscription should be made until the question had been submitted to the legal voters of the town and the subscription assented to by a majority of the legal voters.

A subscription was voted to the *first division* of the Chicago and Rock River Railway Company. The subscription was made by the town authorities to the Chicago and Rock River Railroad Company, and the bonds issued to the latter company. The Supreme Court held the bonds valid, though *voted to one* and in fact *issued to another* company on the ground, that the decision of the town authorities was conclusive.

The court say, "after all it is not an open question as between a *bona fide* holder of the bonds and the township, whether all the necessary prerequisites to their issue had been complied with." "Apart from and beyond the reasonable presumption, that the officers discharged their duty, the matter has passed into judgment." "The persons appointed to decide, whether the necessary prerequisites to their issue had been completed, have decided and certified their decision." "The have declared the contingency to have happened on the occurance of which the authority to issue the bonds was complete." "Their recitals are such a decision and beyond those a *bona fide* purchaser is not bound to look for the evidence of things *in pais*."

In Marcy *vs.* Township of Oswego (October term, 1875, 3, Central Law Journal, 389) this court construed a statute of Kansas (Laws of Kansas, 1870, page 139) which enacted, that whenever fifty qualified voters of a municipal township should petition the board of county commissioners to submit to the voters a proposition to take stock in the name of the township in any Railway Co., designating in the petition the amount of stock to be taken, the commissioners should order such election, provided the amount of bonds voted by such township should not exceed such sum as would require a levy of more than one per cent per annum on the taxable property of the township to pay the yearly interest ; that the commissioners should make an order for holding an election specifying the 'amount of Stock proposed to be subscribed : That, if three fifths of the electors should vote for subscription the commissioners should order the clerk to make it in the name of the township and should cause the bonds to be signed by the chairman of the board and attested by the clerk under the seal of the county and held, that the board of county commissioners were the tribunal to decide whether the conditions precedent had been complied with and that its decision contained in the recital of the bond, was final and conclusive.

And this decision is affirmed in the case of Humboldt Township vs. Long, 3 Cent. Law Journal, 494. And also in City of Lexington vs. Butler, 14 Wall., 296, the court say. "The repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper."

VII.

The county is moreover estopped by its acceptance and retention of the certificates of stock and payment of interest, from denying that all the conditions precedent were complied with.

By these proceedings the county ratified and became conclusively bound by the acts of its agents, the Board of County Commissioners.

Schenck vs. Supervisors, 5 Wall., 772.
Pendleton County vs. Amy, 13 Wall., 297.

The first decision just above given in a case where the election had not been ordered or held by the proper authorities, held that the acceptance of stock and payment of interest on the bonds constituted a ratification of the unauthorized acts of the county's agents.

"Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in cases where the corporation will be held to be concluded, if they remain silent and suffer the shares to be purchased, the bonds to be issued and the securities to be exchanged. Nothing of the kind was attempted in this case, and the defendants have never rescinded or attempted to rescind the contract, and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest, and have actually paid the same to the amount of six thousand dollars, etc." "Every ratification relates or draws back to and is equal to a prior command, and it is equally well settled that the maxim is as applicable to corporations in matters of simple contract as to other contracting parties." Supervisors vs. Schenck, 5 Wallace, 781.

The same principle was decided in Pendleton Co. vs. Amy, cited *supra*, where it is said that: "having exchanged the bonds for stock can it—the county—retain the proceeds of the exchange and assert against a purchaser of the bonds for value, that though the legislature empowered it to make them and put them on the market, they were issued in disregard of the conditions? We think they cannot, and therefore the third plea cannot be sustained." Plaintiff's counsel say that estoppel applies only to third parties. This is not law. The payment of interest to the holder of the bonds constitutes the most conclusive estoppel upon the municipality. And in both cases above cited, there is no showing but that the interest was paid to the party sueing, and to him only.

Schenck vs. Supervisors, and Pendleton vs. Amy, cited *supra*.

And this court has said: "It must be further borne in mind that the invalidity of contracts, made in violation of statutes, is subject to the equitable exception, that, although a corporation in making a contract acts in disagrement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity or organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity.

It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains.

Pine Grove vs. Talcott, 19 Wall, 666.

VIII.

There is a further ground of estoppel against the defense of the plaintiff.

These bonds were duly registered under **the** Registration Act of March 2, 1872. (See Laws of Kansas, 1872, p. 110.) This law authorizes the registration of bonds issued before the passage of the act. The bonds, by sec. 15 of that law, are not registered until notice of their registration is given to the officers issueing the same. The auditor is required before registering to be satisfied that the bonds have been legally issued and that the signatures are genuine. He is then required to certify to the legality of the issue of each bond, the genuineness of the signatures, and the fact of registry under the law. All these requirements have been complied with in this case.

This registration law could have no other object and purpose than to prevent the fraudulent and unlawful issue of bonds, and to give purchasers an evidence of the genuineness and legality of the bonds upon which they can rely.

The bonds registered, as in this case, after issue are not registered *ex parte*, but upon ample notice to the county authorities. They have failed to make any objection to the registry and must be bound thereby. The Auditor becomes, in this case, the agent of the county, and his acts, authorized by law, are conclusive upon it.

The Town of Queensbury vs. Culver, 19 Wall, 83.

These bonds have gone into the market with the certificate under seal of the auditor of State of Kansas, that they are genuine in every respect, which certificate was only made after due notice to the county. Can their payment then be avoided ?

During the last twenty years every concievable question affecting the validity of municipal securities has been decided by this court.

And whenever there has been a law to authorize the issue of the bonds, their validity in the hands of *bona fide* holders has been sustained.

The issues at bar have been settled in our favor again and again.

The plaintiff is conclusively bound by the recitals of its bonds, It has ratified the acts of its agents, the County Commissioners, by the acceptance and retention of the stock and the payment of interest.

It is also estopped from setting up its alleged defenses by the certificate of its other agent, the Auditor of State, that the bonds had been duly registered and legally issued.

And the reversal of the judgment below would be the reversal of all the decisions of the court upon this subject from the date of Knox vs. Aspenwall, to the present time.

JAMES GRANT AND
L. M. FISHER.
For Defendant in Error.

[illegible]

No. 581.

Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON, Plaintiff in Error,

Vs.

DERRICK A. JANUARY, Defendant in Error.

PETITION FOR RE-ARGUMENT.

NELSON COBB,
Counsel for Plaintiff in Error.

No. 581.

Supreme Court of the United States.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY
OF JOHNSON, Plaintiff in Error,

Vs.

DERRICK A. JANUARY, Defendant in Error.

PETITION FOR RE-ARGUMENT.

Plaintiff in error respectfully prays for a reargument of this cause, for the reasons:

That the Court, in the consideration of the cause, has overlooked or mistaken a material part of the record, and has overlooked and failed to consider a legal proposition presented by the argument of plaintiff in error, a due consideration of which, the counsel believes, would have determined the case in favor of the plaintiff in error.

The amount actually involved in the case being the validity of one hundred thousand dollars of bonds, it is believed justifies counsel in asking a more careful consideration of the record and of the principles involved in the case.

The error as to fact consists in this:

The court in its opinion says, "It is not and cannot be denied that, after the passage of the act of 1869, all the proceedings were in strict conformity to its requirements."

If this were true, there would be no defence to the bonds and the railroad company itself might have recovered on them.

But the assertion that it is not denied that after the passage of the act of 1869 the proceedings were in strict conformity with that act, is clearly based on a mistake of fact, as the reading of our printed argument in the case will show. several pages having been devoted to proving that denial.

See the second point on pages 13, 14 and 15, and argument on pages 25 to 28, inclusive, of printed brief filed in this case by plaintiff in error.

We call the attention of the court to the remarks there found, and respectfully say that they show not only that the conformity of the proceedings, after the passage of the law of 1869, to the requirements of that law, is there denied, but also that by showing that the vote taken under that law, according to the construction thereof by the Supreme Court of the State, was void, and that the vote of the people forbade the delivery of the bonds, it is shown that such denial might properly be made, and ought justly to be sustained.

That act required a vote of the people to authorize the issuance of the bonds. This necessarily means a valid vote.

The only vote taken for the issuance of these bonds was on April 6th, 1869, after the law of 1869 came into force, and was on a double proposition, to take stock in and issue bonds to two different railroad companies, and so submitted as to require the voter to vote for both propositions or neither.

See the printed record in this case, page 21.

A vote of this kind the Supreme Court of Kansas, in construing this law of 1869, has characterized as fraudulent and void.

Lewis *vs.* Commissioners of Bourbon County, 12 Kas. 186, pp. 213, 214 and 215.

The proceeding is therefore not in conformity to this law of 1869.

The law of 1869 authorizes the municipal officers to submit the question of taking stock upon such conditions as may be prescribed by the aforesaid county, city or town authorities.

In this case the conditions had been prescribed and were voted upon in the election of April 6th, 1869; one of which was that no bonds should ever be issued unless the road was completed from Lawrence to Olathe by January 1st, 1871.

This condition was not complied with, and the bonds were issued in violation of it. The vote therefore expressly forbade the issuance of the bonds.

It is clear therefore that the proceedings, after the passage of the act of 1869, in two most essential particulars, were not in conformity with the act of 1869, and the Court must have mistaken the record in this respect.

If we are right in this, it is apparent that the validity of the bonds cannot be sustained, except upon the theory that they are entitled to the privilege of commercial paper in the hands of a *bona fide* purchaser for value. We think they are not, and in our printed argument have given our views, to some extent, on that question. But the argument was wholly overlooked and not adverted to in the opinion of the Court.

We claim that the bonds, reciting upon their face that "this bond is executed and issued by virtue of and in accordance with an act of the Legislature of Kansas, entitled an act to authorize counties and cities to issue bonds to railroad companies, and in pursuance of and in accordance with the vote of a majority of the qualified electors of the County of Johnson, at a regular election held on the 6th day of April, 1869," and the 4th section of that act limiting the effect of the act to cases where the vote was taken prior to January 21st, 1868, the bonds appear, upon their face, to have been issued without authority, and that therefore they are not entitled to the privileges of commercial paper. We claim also that the said recital gives notice of the defect in the proceedings that actually existed, that the bonds were issued under color of a dual vote, such as was had in this case.

And we respectfully call the attention of the Court to our remarks upon this subject, and authorities cited in our points and argument, pages 15, 16, 30, 31, and 32.

We ask leave to reargue the questions:

First. Whether the proceedings, resulting in the issuance of the bonds, were so far in accordance with law that the bonds were valid in the hands of the railroad company;

Second. Whether the bonds, not being valid in the hands of the railroad company, are, upon their face, entitled to the privileges extended by the law merchant to commercial paper. All which is respectfully submitted.

NELSON COBB,
Counsel for Plaintiff in Error.